No. 95-1521-CFX

Title: United States Department of State, Bureau of Consular Affairs, et al., Petitioners
v.
Legal Assistance for Vietnamese Asylum Seekers, Inc., et al.

Docketed:
March 22, 1996

Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Mar 21 1996	Petition for writ of certiorari filed. (Response due April 21, 1996)
	Apr 22 1996	Brief of respondents Legal Assistance for Vietnamese Asylum Seekers, et al. in opposition filed.
	May 1 1996	DISTRIBUTED. May 17, 1996
	May 6 1996	Reply brief of petitioners filed.
	May 20 1996	REDISTRIBUTED. May 24, 1996
	May 28 1996	REDISTRIBUTED. May 31, 1996
	Jun 3 1996	REDISTRIBUTED. June 7, 1996
	Jun 10 1996	REDISTRIBUTED. June 14, 1996
	Jun 17 1996	Petition GRANTED. SET FOR ARGUMENT October 15, 1996. **********
	Jun 24 1996	Motion of respondents to join additional parties filed.
	Jul 3 1996	Application for extension of time to respond to motion filed.
	Jul 3 1996	Opposition thereto filed.
	Jul 5 1996	Time to file response extended by Chief Justice to and including July 12, 1996
	Jul 12 1996	Brief of petitioner in opposition to joinder of two individuals and the motion for class certification filed.
	Jul 17 1996	Reply of respondents in support of motion to join additional parties and motion for class certificastion filed. DISTRIBUTED.
	Jul 24 1996	DISTRIBUTED. September 30, 1996 (Page 59)
	Aug 1 1996	Brief of petitioners U.S. Department of State, Bureau of Consular Affairs, et al filed.
	Aug 1 1996	Joint appendix filed.
	Aug 26 1996	Record filed.
	Sep 4 1996	Brief of respondents Legal Assistance for Vietnamese Asylum Seekers, Inc., et al. filed.
	Sep 4 1996	Letter from members of the House of Representatives to President William Clinton, dated August 1, 1996 submitted by counsel for the respondents
	Sep 16 1996	CIRCULATED.
	Sep 18 1996	Record filed.
	Oct 2 1996	Parties directed to brief the question of the applicability of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, H.R. 3610, 104th Cong., 2nd Sess. Div. C, Sec. 633 ("Authority to Determine Visa Processing Procedures"), 142 Conf. Rec. H11827 (daily ed. Sept. 28, 1996)(amending 8 U.S.C. 1152(a)(1)) to this case and whether this case is moot.

Entry	Date	Proceedings and Orders
		Briefs are to be filed with the Clerk, and served upon opposing counsel, on or before 3 p.m., Octoober 11, 1996. Twenty typewritten copies of each brief may be filed initially in order to meet the October 11 filing date. Forty copies of the brief prepared under Rule 33.1 are to be filed as soon as possible thereafter.
	Oct 7 1996	Motion of respondents to join additional parties GRANTED. Justice Scalia, Justice Souter, Justice Thomas and Justice Ginsburg dissent. The motion of respondents for class certification is denied.
	Oct 7 1996	Reply brief of petitioners U.S. Dept. of State, Bureau of Consular Affairs, et al. filed.
	Oct 11 1996	Supplemental brief of petitioners filed.
	Oct 11 1996	Supplemental brief of respondents filed.
	Oct 11 1996	LODGING consisting of one copy of a supplemental declaration of Mark L. Zuckerman, counsel for the respondents received and distributed
	Oct 15 1996	ARGUED.
	Oct 16 1996	Letter from counsel for the respondents received and distributed
	Oct 16 1996	Letter from the Solicitor General received and distributed
	Oct 17 1996	Letter from counsel for the respondents received and distributed.
	Oct 21 1996	Adjudged to be VACATED and REMANDED to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of Section 633 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRA) enacted as Division C of the Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996)). Opinion per curiam.

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., PETITIONERS

v.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

MICHAEL JAY SINGER
ROBERT M. LOEB
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

109 pp

QUESTIONS PRESENTED

1. Whether the policy of the United States Government not to accept immigrant visa applications from Vietnamese migrants who have been determined not to be refugees until they return to their country of origin violates 8 U.S.C. 1152(a)(1), which provides that no person shall be discriminated against in the issuance of an immigrant visa because of that person's nationality.

2. Whether a court may review the decision not to process an immigrant visa application based on consular venue considerations.

PARTIES TO THE PROCEEDINGS

Petitioners are the United States Department of State, Bureau of Consular Affairs; Warren Christopher, Secretary of State; Mary A. Ryan, Assistant Secretary of State for Consular Affairs; Donna Hamilton, Deputy Assistant Secretary of State for Consular Affairs; Richard Mueller, Consul, Consulate General of the United States in Hong Kong; and Wayne Leininger, Chief of the Consular Section, Consulate General of the United States in Hong Kong. Petitioners were defendants in the district court and appellees in the court of appeals. All individual petitioners appear in their official capacities only. Matthew Victor, who was also a defendant-appellee below in his official capacity as Refugee Officer, Consulate General of the United States in Hong Kong, no longer holds that position, which has been abolished; the responsibilities of the position have been distributed among several other officials.

Respondents, who were plaintiffs-appellants below, are Legal Assistance for Vietnamese Asylum Seekers, Inc. (LAVAS); Thua Van Le; Em Van Vo; Thu Hoa Thi Dang; and Truc Hoa Thi Vo.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of State, Bureau of Consular Affairs, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The order of the district court denying a temporary restraining order (App., *infra*, 19a-21a) is unpublished. The order of the court of appeals entering a preliminary injunction (App., *infra*, 22a-23a) is unpublished. The order of the district court granting summary judgment to petitioners (App., *infra*, 24a-28a) is unpublished. The opinion of the court of appeals from which review is sought, which reversed

the district court's grant of summary judgment to petitioners and remanded for further proceedings (App., *infra*, 1a-18a), is reported at 45 F.3d 469. A subsequent order of the court of appeals directing a limited remand on the issue of mootness (App., *infra*, 29a-30a) is unpublished. The opinion of the district court on that limited remand, concluding that the case was moot and dismissing the case (App., *infra*, 31a-38a), is reported at 909 F. Supp. 1. The opinion of the court of appeals reversing the district court's mootness ruling, remanding for further proceedings, and denying the government's petition for rehearing (App., *infra*, 39a-49a), is not reported. The order of the court of appeals rejecting petitioners' suggestion of rehearing en banc (App., *infra*, 50a-51a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1995. App., *infra*, 1a. A petition for rehearing was denied on February 2, 1996. App., *infra*, 39a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 202(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1152(a)(1), provides:

> Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

2. Section 222(a) of the Immigration and Nationality Act, 8 U.S.C. 1202(a), provides in part that "[e]very alien applying for an immigrant visa and for alien registration shall make application therefor in such form and manner and at such place as shall be by regulations prescribed."

STATEMENT

This case concerns the application of Section 202(a)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. 1152(a)(1), which, among other things, prohibits discrimination on the basis of nationality in the issuance of visas. This case also presents a threshold question under the doctrine of consular nonreviewability, which generally precludes courts from reviewing the decisions of United States consular officials not to grant visas to aliens residing abroad. The issues in this case are closely related to those in *Lisa Le* v. *United States Department of State, Bureau of Consular Affairs*, No. 95-5425 (D.C. Cir.), which the court of appeals recently agreed to hear en banc. See App., *infra*, 74a-75a. The court of appeals has declined, however, to vacate the judgment in this case pending its en banc ruling in *Lisa Le*, or to stay its mandate beyond March 21, 1996. *Id.* at 54a-55a.[1]

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[1] In this petition, we refer to this case as *LAVAS*, and to the companion case as *Lisa Le*. Counsel for the parties are the same in both cases. Some of the materials referred to in this petition are in the record in the *Lisa Le* case but not this case. "*LAVAS* C.A. App." refers to the joint appendix filed by the parties in the court of appeals in this case, and "*Lisa Le* C.A. App." refers to the joint appendix filed by the parties in the court of appeals in the *Lisa Le* case. "Gov't C.A. Br. Addendum" refers to the addendum to the appellate brief filed by the

1. a. During the 1980s, a combination of political and economic circumstances in Vietnam and the prospect of resettlement in another country, particularly the United States, induced many Vietnamese nationals to migrate to other countries in Southeast Asia. The resources of the countries where those migrants first landed had already been strained by large migrations from Vietnam, Laos, and Cambodia; for example, more than 750,000 Vietnamese nationals alone have migrated to other countries in Southeast Asia. Because of the substantial migration, some countries began to turn back migrant "boat people," which often resulted in tragic loss of life at sea. *LAVAS* C.A. App. 186-193.

To defuse the migration crisis, to protect those migrants who genuinely feared political persecution, and to avoid further loss of life, some 50 countries, including the United States, Vietnam, and Hong Kong, entered in 1989 into a multinational initiative, the Comprehensive Plan of Action (CPA).[2] The CPA establishes an internationally coordinated system for screening Vietnamese and Laotian migrants for legitimate claims of refugee status, and is designed to deter dangerous and uncontrolled economic migration in Southeast Asia. Under the CPA, Vietnamese and Laotian migrants are permitted to land and are "screened" under international standards to determine whether they are refugees (*i.e.*, whether they

government in this case. We have lodged copies of both joint appendices and the addendum with the Clerk of this Court.

[2] The CPA's text is reprinted as an addendum to the government's court of appeals brief in this case, and also at *Lisa Le* C.A. App. 189-193. Although the United States as a matter of foreign policy adheres to the terms of the CPA, it does not have formal status under United States law.

have a well-founded fear of persecution).[3] Those found to qualify as refugees ("screened-in") are permitted to seek resettlement in a third country. CPA § II.E.2 (Gov't C.A. Br. Addendum); *LAVAS* C.A. App. 187.

A central tenet of the CPA is that a migrant found ineligible for refugee status must return to his or her country of origin. The agreement of the CPA's participants that "screened-out" migrants will be repatriated was essential in persuading reluctant countries to permit migrants to land and attempt to establish their claims to refugee status, rather than turn them back to sea. *LAVAS* C.A. App. 188-190. The CPA requires that "every effort will be made to encourage the voluntary return" of screened-out migrants, but it does not prohibit Hong Kong from involuntarily repatriating them. Today, approximately 20,000 screened-out Vietnamese migrants remain in Hong Kong. *Id.* at 189, 190, 192, 273-274; CPA § II.F (Gov't C.A. Br. Addendum). The treatment of migrants returning to Vietnam is extensively monitored by the United Nations High Commissioner for Refugees (UNHCR), who has found that the "vast majority of returnees" face "no

[3] Pursuant to the CPA, the migrants are screened under criteria established by the United Nations High Commissioner for Refugees (UNHCR) based upon the 1951 United Nations Convention Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6259, 6261-6264. In Hong Kong, the migrant asylum seeker is screened by Hong Kong authorities under UNHCR standards to determine whether the migrant has a well-founded fear of persecution. If the migrant is found not to qualify as a refugee, he or she may appeal to the Refugee Status Review Board, an independent body established under the CPA. If the Board finds that the migrant does not qualify as a refugee, the migrant may appeal further to the UNHCR. *LAVAS* C.A. App. 87-88.

protection problems whatsoever." *UNHCR Monitoring of the Repatriation and Reintegration of CPA Returnees to Vietnam* (Hanoi 1995) (*Lisa Le* C.A. App. 446); see also *LAVAS* C.A. App. 97, 290.

b. A number of Vietnamese nationals who migrated to Hong Kong applied for immigrant visas to the United States. Prior to April 1993, the United States Consulate General in Hong Kong processed the immigrant visa applications of migrants before they were screened under the CPA, and sometimes even after they were screened out. *LAVAS* C.A. App. 90-92. That processing (which was resumed for a short period after February 1994) provoked objections from the UNHCR and other signatories to the CPA. They maintained that processing by United States officials of screened-out migrants for direct resettlement in the United States from countries of "first asylum" such as Hong Kong would undermine the CPA process, by deterring voluntary repatriation and inducing further migration. See *id.* at 191; Affidavit of Charles Sykes, Deputy Assistant Secretary of State ¶¶ 5-7 (June 15, 1995) (*Lisa Le* C.A. App. 217-218).

Taking into account those objections and the impact of such processing on voluntary repatriation, the State Department adopted a firm, prospective policy (effective December 1, 1994) against processing any new immigrant visa applications of screened-out migrants until they return home. Sykes Aff. ¶¶ 6-8 (June 15, 1995) (*Lisa Le* C.A. App. 217-218). At the February 1995 annual meeting of the steering committee of governments participating in the CPA, the United States joined the UNHCR and other CPA participants in reaffirming their commitment to that process, including voluntary repatriation of the

migrants. The consensus statement adopted by the steering committee explicitly included a commitment by the United States not to consider screened-out Vietnamese migrants for resettlement until they return to Vietnam. Sykes Aff. ¶ 8 (June 15, 1995) (*Lisa Le* C.A. App. 218); see also Affidavit of Charles Sykes ¶ 5 (Feb. 16, 1996) (filed in court of appeals in support of stay in *Lisa Le*) (lodged with the Clerk of this Court).

In February 1996, the British Foreign Minister appealed to Secretary of State Warren Christopher for a "clear statement" by the CPA steering committee "that the remaining migrants should now go back to Vietnam." Sykes Aff. ¶¶ 8-9 (Feb. 16, 1996). On March 6, 1996, the United States joined another consensus statement of the CPA steering committee, once again reaffirming that Vietnamese migrants found not to be refugees should return to Vietnam.[4] The consensus statement notes that the CPA, including the requirement of repatriation of persons found not to be refugees, has effectively brought the crisis created by the dangerous and clandestine migration at sea to a halt. The consensus statement also observes that the CPA will formally come to an end on June 30, 1996. It further notes an earlier statement by the members of the Association of South East Asian Nations (ASEAN) that repatriation should be completed as soon as possible, and that "there should be no other actions or other new initiatives which will interrupt or adversely affect

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[4] A copy of the March 6, 1996, consensus statement has been lodged with the Clerk and provided to counsel for respondents.

the CPA implementation, particularly repatriation, as in the past."[5]

In the case of Vietnamese nationals who return to Vietnam, immigrant visa applications are processed in Vietnam pursuant to the Orderly Departure Program (ODP). The ODP is a major emigration program established by the United States and Vietnamese governments, by which more than 410,000 Vietnamese nationals have been resettled in the United States directly from Vietnam. Sykes Aff. ¶ 14 (*Lisa Le* C.A. App. 219-220); see also *LAVAS* C.A. App. 191-192. Processing and approval of a visa application through the ODP after a migrant's return takes approximately three to six months; because of other exit formalities, the total time from a migrant's return to Vietnam until his or her exit under the ODP may be six to twelve months. *Id.* at 192, 274. Vietnam has not impeded the orderly departure from Vietnam of repatriated migrants. *Id.* at 113, 192, 299-301.

2. This action was brought in the United States District Court for the District of Columbia on February 25, 1994, to challenge the United States

[5] See Consensus Statement (Mar. 6, 1996); Sykes Aff. ¶ 7 (Feb. 16, 1996). The members of ASEAN are Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Vietnam. Hong Kong, which currently has the status of a Crown Colony of the United Kingdom, is not a member of ASEAN. As of July 1, 1997, Hong Kong will be administered by the People's Republic of China. The UNHCR has undertaken to "make other appropriate arrangements with the aim of completely solving the Vietnamese boat people problem in Hong Kong as soon as possible after 30 June 1996 so as to enhance the success of the CPA." See Consensus Statement (Mar. 6, 1996).

Government's policy against processing visa applications of screened-out migrants until they return home. The plaintiffs (respondents in this Court) are a non-profit legal rights organization (LAVAS), two screened-out Vietnamese nationals who migrated from Vietnam to Hong Kong (Ms. Thu Hoa Thi Dang and Ms. Truc Hoa Thi Vo), and the individual migrants' sponsors in the United States.[6] Pursuant to the CPA, Ms. Dang and Ms. Vo had been screened by Hong Kong authorities under international standards, and had been found not to be refugees. They had then sought to apply for immigrant visas to the United States. Each was informed by a consular officer at the United States Consulate General in Hong Kong that, because she had been found not to be a refugee, she could not apply for an immigrant visa in

[6] Ms. Dang's sponsor is her husband, Thua Van Le, a United States citizen. *LAVAS* C.A. App. 65. Ms. Vo's sponsor is her father, Em Van Vo, also a United States citizen. *Id.* at 198. Ms. Dang and Ms. Vo have sought to gain the benefit of a provision of the INA that gives an immigration preference to close relatives of United States citizens. See 8 U.S.C. 1151(b)(2)(A)(i) and 1153(a)(1). A sponsoring citizen must first file a petition to have the relative alien accorded an eligible classification. See 8 U.S.C. 1154; 8 C.F.R. 204.1(a). If the Immigration and Naturalization Service (INS) approves the petition, the alien must then submit an application for an immigrant visa to the designated consular office of the Department of State. 22 C.F.R. 42.61(a). The applicant must provide various documents to the consular office and must appear at the consulate for final processing of the application, including an interview by a consular officer. 8 U.S.C. 1202(a); 22 C.F.R. 42.62 *et seq.*

Hong Kong but could apply only in her country of origin. *LAVAS* C.A. App. 85, 210.[7]

The district court granted the government's motion for summary judgment. App., *infra*, 24a-28a. The district court rejected respondents' contention that the government's policy concerning screened-out migrants violated a Department of State regulation, 22 C.F.R. 42.61(a) (1993), which at the time provided that, "[u]nder ordinary circumstances, an alien seeking an immigrant visa shall have the case processed in the consular district in which the alien resides." The court accepted, as a policy choice entitled to deference, the State Department's determination that "the situation of the detained Vietnamese asylum-seekers in Hong Kong is not an 'ordinary circumstance.'" App., *infra*, 27a (footnote omitted). Accordingly, it concluded that "the failure to process the immigrant visa applications of Vietnamese asylum-seekers denied refugee status in Hong Kong does not violate the INA and the regulations promulgated thereunder." *Id.* at 28a.

3. A divided panel of the court of appeals reversed and remanded. App., *infra*, 1a-18a. As an initial matter, the majority held that the migrant plaintiffs' relatives in the United States had a right under the Administrative Procedure Act (APA), 5 U.S.C. 702, to

[7] As the court of appeals noted, Ms. Dang has been granted an immigrant visa to the United States; the case is therefore moot as to her and her sponsor. App., *infra*, 42a. The court of appeals concluded, however, that the case is not moot as to Ms. Vo and her sponsor. The United States Consulate General in Hong Kong denied Ms. Vo's visa application, but, because of the basis for that denial, the court reasoned that she is "free to file another application." *Id.* at 46a. We do not seek review of that ruling.

bring an action to require that the migrants' visa applications be accepted in Hong Kong. The majority therefore declined to consider whether the migrant plaintiffs themselves or LAVAS has a right of judicial review. App., *infra*, 5a-6a.

On the merits, the majority rejected respondents' claims based upon the State Department regulation (App., *infra*, 7a-8a),[8] but it held (*id.* at 8a-12a) that the policy of not processing applications submitted by screened-out Vietnamese migrants in Hong Kong violates Section 202(a)(1) of the INA. That Section provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's * * * nationality." 8 U.S.C. 1152(a)(1). The court held that petitioners had violated that provision in drawing what it believed to be "an explicit distinction between Vietnamese nationals and nationals of other countries when refusing to process the visas of the screened out Vietnamese immigrants." App., *infra*, 9a. The court declined to defer under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), to the contrary administrative interpretation of Section 202(a)(1), because it

[8] The regulation was amended effective September 6, 1994. 59 Fed. Reg. 39,955 (1994). It now provides that, "[u]nless otherwise directed by the [State] Department," an alien applying for an immigrant visa shall present the application at the consular office having jurisdiction over the alien's place of residence, or (if the alien has no residence) at the consular office where the alien is physically present. 22 C.F.R. 42.61(a). The court of appeals noted that the State Department has exercised its authority to "direct otherwise" with respect to the venue for processing visa applications by screened-out Vietnamese migrants in Hong Kong. App., *infra*, 8a.

found that Section to be unambiguous on the point. App., *infra*, 11a.[9]

Judge Randolph dissented. App., *infra*, 13a-18a. He first noted that "[t]he potential repercussions of the majority's decision are, to say the least, disquieting. The flight of illegal aliens to Hong Kong and elsewhere has created an international crisis. Fifty nations have sought to avert the flood by stopping the flow. Not processing their visas in Hong Kong removes one of the reasons so many of these people are leaving their homeland and embarking on the dangerous journey across the South China Sea." *Id.* at 14a. Judge Randolph then concluded that "[t]he so-called 'discrimination' the majority detects stems from the illegal status of the screened out boat people, rather than from the fact (if it is a fact) that they are all Vietnamese nationals." *Id.* at 15a. He reasoned that the government's policy with respect to screened-out migrants in Hong Kong "is not discrimination on the basis of nationality, but discrimination on the basis of legality. And the statute does not forbid it." *Ibid.*

4. The government filed a petition for rehearing and suggestion of rehearing en banc. After a limited remand for proceedings on the issue of mootness, the panel concluded that the case was not moot and denied rehearing. App., *infra*, 39a-46a. The panel again remanded the case to the district court for class certification proceedings. *Id.* at 47a.

[9] The majority stated that the INA is committed to the administration of the INS, and that it is an INS interpretation that is at issue here. App., *infra*, 11a. In fact, the particular visa provisions at issue are administered by the Secretary of State and consular officers, and it therefore is the Secretary's interpretation that is at issue (and that is entitled to deference under *Chevron*), absent a controlling interpretation by the Attorney General. See 8 U.S.C. 1103.

Judge Randolph dissented from the denial of rehearing. He noted that "further doubts have been raised about the majority's interpretation" of Section 202(a)(1). App., *infra*, 49a. He pointed out that, in the companion *Lisa Le* case, the government argues that Section 202(a)(1) governs only the issuance of visas, not "where visa applications must be processed," App., *infra*, 49a, and that consular venue determinations are, in any event, "entrusted entirely to the Secretary of State," *ibid.* Those arguments were also presented in the government's petition for rehearing and suggestion of rehearing en banc (at pages 5-6 and 10-13) in this case. The full court of appeals nonetheless rejected the government's suggestion of rehearing en banc, with four judges dissenting. App., *infra*, 50a-51a.

5. While the government's rehearing petition in this case was pending in the court of appeals, a separate action (known as the *Lisa Le* case) was filed in district court by another screened-out Vietnamese migrant in Hong Kong and her sponsor in the United States. Those plaintiffs' cases became moot after the United States Consulate General in Hong Kong processed the migrant's visa application (as required by a preliminary injunction issued by the district court, which the court of appeals refused to stay) and granted her an immigrant visa. Twenty-five more screened-out migrants and their 25 sponsors entered the second action as additional plaintiffs. On March 1, 1996, the district court granted summary judgment for all but two of those additional plaintiffs (who were denied intervention), reasoning that the case was, "in

all relevant respects, identical to *LAVAS*." App., *infra*, 70a. The court permanently enjoined petitioners from "implementing their decision to decline processing plaintiff detainees' immigrant visa applications at the United States Consulate in Hong Kong." *Id.* at 73a.

The government appealed the district court's injunction in *Lisa Le* and suggested that the case be heard initially by the court of appeals en banc. On March 12, 1996, the full court granted initial hearing en banc in *Lisa Le*. App., *infra*, 74a-75a.[10] The government then filed a motion in the instant case, requesting that the panel vacate its judgment (or, in the alternative, further stay the issuance of its mandate) pending the decision of the en banc court in *Lisa Le*.[11] On March 14, 1996, the panel denied that motion. *Id.* at 54a-55a. We accordingly have found it necessary to file this certiorari petition, even though the questions presented are now also before the en banc court of appeals.

REASONS FOR GRANTING THE PETITION

The court of appeals seriously erred in its interpretation of Section 202(a)(1) of the Immigration and Nationality Act (INA). Its decision will undermine the effectiveness of the Comprehensive Plan of Action (CPA), a major foreign policy initiative that has been responsible for bringing an end to the dangerous,

[10] As of March 20, 1996, the en banc court of appeals has not acted on the government's motion for a stay of the district court's injunction in *Lisa Le* pending appeal.

[11] The panel had previously granted the government's motion to stay the issuance of the mandate in this case, to and including March 21, 1996, to permit the government to file a petition for a writ of certiorari. App., *infra*, 52a-53a.

uncontrolled, and clandestine migration of Vietnamese nationals in Southeast Asia. If allowed to stand, the decision will constrain the United States Government's ability to respond to similar migration crises in the future. The decision also casts doubt on other important State Department policies, some rooted in national security concerns, designating specific locations for nationals of certain countries to apply for immigrant visas, or subjecing their applications to special procedures. Moreover, the court of appeals' holding that persons in the United States have a right to obtain judicial review of consular decisions concerning aliens abroad circumvents the well established doctrine of consular nonreviewability and opens an unprecedented avenue of judicial review. Because venue lies in the United States District Court for the District of Columbia over such actions brought by persons residing anywhere in the Nation, the District of Columbia Circuit's rulings on reviewability and the merits have nationwide significance.

The panel's errors, and the significant adverse consequences of those errors, warrant review by this Court. The issues in this case, however, are now being considered by the en banc court of appeals in *Lisa Le*, the companion case. Nevertheless, the panel declined to vacate its judgment in this case or to stay the issuance of its mandate beyond March 21, 1996. Accordingly, we have filed this certiorari petition to protect our right to review of the panel's decision, should the decision of the en banc court be adverse to the government, and also to prevent issuance of the mandate, which would return this case to the district court for class certification proceedings, as directed by the panel. See App., *infra*, 47a. We suggest that the Court hold this petition pending the decision of

the court of appeals in *Lisa Le*, and then dispose of it as appropriate in light of the decision in that case.

1. a. The court of appeals' construction of Section 202(a)(1) of the INA is erroneous. Section 202(a)(1) provides that (with certain exceptions not relevant here) no person shall be discriminated against "in the issuance of an immigrant visa" on the basis of nationality. See 8 U.S.C. 1152(a)(1). It generally prohibits consular officers from granting or denying visas on the basis of nationality. It does not, however, speak to the State Department's authority to control *where* aliens may apply for visas. That subject (known as consular venue) is covered separately by Section 222(a) of the INA, which provides that an alien applying for an immigrant visa "shall make application therefor in such form and manner and at such place as shall be by regulations prescribed." 8 U.S.C. 1202(a).

The reading of Section 202(a)(1) as limited to substantive visa decisions is confirmed by the structure and origin of that provision. Section 202 generally addresses numerical limits on the issuance of immigration visas. The placement of Subsection (a)(1) within that Section therefore indicates that it is directed at the issuance of visas, not that it applies broadly to all consular and State Department functions under the INA. Indeed, the anti-discrimination language was added to Section 202 in 1965 as part of Congress's abandonment of the old immigration system, which employed national-origin quotas. See Pub. L. No. 89-236, § 2, 79 Stat. 911-912. Congress replaced the former system with one that provides (subject to certain exceptions) for "issuance of immigrant visas without regard to national origin." See H.R. Rep. No. 745, 89th Cong., 1st Sess. 19 (1965); *id.* at 9, 10-13, 17; see also S. Rep. No. 748, 89th Cong.,

1st Sess. 12-13, 21-22 (1965). Section 202(a)(1) was intended to address the subject of relative "preference" or "priority," and the corresponding disadvantage of "discrimination," in the allocation of immigration visas. Nothing in its background suggests that it was intended to address consular venue.

The INA therefore does not prohibit the State Department from making distinctions based on nationality in prescribing the form, manner, or place of immigrant visa processing. To the contrary, in enacting Section 222, Congress "consciously decided to leave the determination of place of immigrant visa application to the Secretary of State." 59 Fed. Reg. 39,953 (1994). In fact, when Section 202(a)(1) was enacted, the State Department had long had in place special security procedures governing the processing of visa applications filed by aliens from certain countries, and that practice continues. See Declaration of Cornelius D. Scully, III ¶¶ 3-10 (Aug. 7, 1995) (*Lisa Le* C.A. App. 416-424).

The Department also has numerous consular venue rules turning on nationality, which reflect security, diplomatic, and management concerns, including the location of consular officers who have expertise about conditions in particular countries.[12] Affidavit of Michael Hancock ¶¶ 7-9 (June 15, 1995) (*Lisa Le* C.A. App. 249). For example, because the State Department does not process immigrant visas in their countries, it has directed Afghanis to apply for immigrant visas in Islamabad; Iranians in Abu Dhabi,

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[12] The State Department's reliance on consular officials with expertise is particularly important because, under the INA, the Secretary of State has no authority to overturn a consular official's decision to grant or deny a visa. See 8 U.S.C. 1104(a).

Ankara, Vienna, or Naples; Iraqis in Amman or Casablanca; Lebanese in Abu Dhabi, Damascus, or Nicosia; Libyans in Tunis or Valletta; and Somalis in Nairobi, Dar-es-Salaam, and Djibouti. See Richard D. Steel, *Steel on Immigration Law* § 7.05 n.5 (2d ed. 1992); Scully Dec. Attach. (*Lisa Le* C.A. App. 435). All of those policies are now potentially subject to judicial second-guessing as a result of the court of appeals' mistaken construction of Section 202(a)(1).

b. Even assuming that Section 202(a)(1) governs consular venue, the policy challenged in this case nonetheless does not violate its anti-discrimination rule. As Judge Randolph observed (App., *infra*, 14a-15a), the policy makes a distinction between migrants who have been denied refugee status under the internationally sanctioned CPA review process, and all other aliens, including migrants who have been granted refugee status. The policy thus turns on whether the migrant has been "screened out" under the CPA, not the migrant's nationality. Vietnamese migrants who are "screened in," as well as Vietnamese nationals in Hong Kong not subject to screening under the CPA (whether in Hong Kong legally or illegally) may have their immigrant visa applications processed in Hong Kong. Sykes Aff. ¶ 13 (June 15, 1995) (*Lisa Le* C.A. App. 219).

The CPA was devised to deal with a unique and unprecedented problem of mass migration by Vietnamese and Laotian nationals. It is mistaken to conclude from that fact, however, that the policy at issue here discriminates on the basis of nationality. There are no other nationality groups that are similarly situated yet treated differently. Laotian asylum seekers, who are concentrated in Thailand, are also subject to the CPA refugee screening pro-

cess, and if they are "screened out," they must return to Laos for visa processing. Sykes Aff. ¶ 4 (June 15, 1995) (*Lisa Le* C.A. App. 217).

Furthermore, the panel's decision is legally unsound because there is no basis for concluding that State Department policies regarding the place for acceptance of visa applications have any discriminatory effect on the *issuance* of the visas, which is the subject covered by the statutory anti-discrimination provision. In fact, the consular venue policy challenged by respondents does not have an unfavorable impact on the issuance of visas to Vietnamese nationals. Vietnamese have been among the greatest recipients of immigrant visas in recent years. Hancock Aff. ¶ 5 (June 15, 1995) (*Lisa Le* C.A. App. 248). More than 410,000 Vietnamese nationals, including more than 200,000 immigrants, have been resettled in the United States through the ODP. Sykes Aff. ¶ 14 (June 15, 1995) (*Lisa Le* C.A. App. 219-220); *LAVAS* C.A. App. 192.

c. The court of appeals also erred, as a threshold matter, by disregarding the doctrine of consular nonreviewability. The courts, including this Court, have held that visa decisions are immune from judicial review (except perhaps to the extent that a United States citizen claims that the denial of a visa has violated his or her own constitutional rights). *City of New York* v. *Baker*, 878 F.2d 507, 512 (D.C. Cir. 1989); *Centeno* v. *Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988); *Ventura-Escamilla* v. *INS*, 647 F.2d 28, 30 (9th Cir. 1981); *Wan Shih Hsieh* v. *Kiley*, 569 F.2d 1179, 1181 (2d Cir.), cert. denied, 439 U.S. 828 (1978); see also *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972); *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3 (1956); *Lem Moon*

Sing v. *United States*, 158 U.S. 538, 547 (1895). But see *Abourezk* v. *Reagan*, 785 F.2d 1043, 1049-1052 (D.C. Cir. 1986), aff'd by an equally divided Court, 484 U.S. 1 (1987). The preclusion of judicial review in this context is a consequence of the "power of Congress to exclude aliens altogether from the United States * * * without judicial intervention." *Ventura-Escamilla*, 647 F.2d at 30. It is also based on the historical nature of a visa decision as a diplomatic action, such that disputes regarding visa applications are matters for "diplomatic complaint" between nations, not judicial redress. *United States ex rel. London* v. *Phelps*, 22 F.2d 288, 290 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928).[13]

The court of appeals grounded review on the general judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See App., *infra*, 5a. That approach was in error, for Congress has intended the review provisions of the INA to supplant the APA in immigration matters. *Haitian Refugee Center* v. *Baker*, 953 F.2d 1498, 1505-1509 (11th Cir.), cert. denied, 502 U.S. 1122 (1992); see also *Ardestani* v. *INS*, 502 U.S. 129, 133 (1991). Contra *Abourezk*, 785 F.2d at 1050. The INA sets forth the exclusive avenues of judicial review when an alien brings a challenge concerning his exclusion or

[13] An immigrant visa does not provide an alien with any right to admission or entry into the United States. See 8 U.S.C. 1201(h). Rather, it authorizes an alien to travel to a port of entry of the United States. *Ibid.*; see *Hermina Sague* v. *United States*, 416 F. Supp. 217, 218-219 (D.P.R. 1976). A visa tells the officials of other countries, and U.S. immigration officials at a port of entry, that the alien has the United States Government's permission to travel to the United States in order to seek admission.

deportation. Those avenues do not include any provision for judicial review of consular visa determinations, including consular venue decisions.

Although Congress in 1961 expressly authorized judicial review under the INA of determinations affecting aliens who are subject to deportation or exclusion proceedings (see 8 U.S.C. 1105a),[14] that right of review is limited to aliens who are at a port of entry (see 8 U.S.C. 1221(a) and 1225) or who are already "in the United States" (see 8 U.S.C. 1253(a)).[15] Congress provided no corresponding right to judicial review for aliens abroad who seek admission from outside the United States. See *Haitian Refugee* Center, 953 F.2d at 1506; *Loza-Bedoya* v. *INS*, 410 F.2d 343, 347 (9th Cir. 1969); see also *Braude* v. *Wirtz*, 350 F.2d 792, 706 (9th Cir. 1965) ("it [is] not without significance that Congress has limited judicial review to * * * the alien[s] within the borders of this country"). Accordingly, the courts have no authority to review the determination by consular officers not to accept the migrant

[14] 8 U.S.C. 1105a was added to the INA in 1961 by Pub. L. No. 87-301, § 5(a), 75 Stat. 651.

[15] Indeed, Congress enacted 8 U.S.C. 1105a in 1961 to confine judicial review of exclusion orders to habeas corpus proceedings, and thereby to overturn *Brownell* v. *Tom We Shung*, *supra*, which held that such orders were also subject to review in a declaratory judgment action under the APA. See H.R. Rep. No. 1086, 87th Cong., 1st Sess. 30-33 (1961). Given that Congress has now precluded review under the APA for aliens physically present in the United States, it follows *a fortiori* that such review is not available to aliens who have not reached our borders. See *Tom We Shung*, 352 U.S. at 184 n.3 (making clear even prior to 1961 enactment of 8 U.S.C. 1105a that APA review was not available to an alien "who has never presented himself at the borders of this country."

respondents' visa applications for processing in Hong Kong.

Indeed, when Congress enacted the INA in 1952 and at that time left judicial review of immigration determinations governed by the APA, its action was specifically "not in

tended to grant any review of determinations made by consular officers, nor to expand judicial review in immigration cases beyond that under existing law." *Brownell* v. *Tom We Shung*, 352 U.S. at 185 n.6 (quoting S. Rep. No. 1137, 82d Cong., 2d Sess. 28 (1952)). The court of appeals effectively circumvented that rule by recognizing a right of judicial review at the behest of persons in the United States who wish to have an alien abroad admitted to this country. App., *infra*, 5a-6a. But there is no reason to believe that Congress would have wanted to give United States sponsors of aliens the right to judicial review of consular officers' visa decisions, given that it precluded review at the behest of the aliens seeking admission, the persons most directly affected by the consular action.

Finally, even if aliens could obtain judicial review under the APA of some substantive visa decisions, judicial review of the State Department's consular venue decisions is nonetheless precluded because those decisions are "committed to agency discretion by law." 5 U.S.C. 701(a)(1). Section 222(a) provides that aliens seeking visas "shall make application therefor in such form and manner and at such place as shall be by regulations prescribed." 8 U.S.C. 1202(a). That language demonstrates that Congress decided to leave to the Secretary of State the authority to determine where and how aliens shall apply for immigrant visas.

2. a. The court of appeals' decision, if permitted to stand, may have serious adverse consequences for the successful operation and conclusion of the CPA. A principal objective of the CPA has been to deter the dangerous migration of Vietnamese "boat people" throughout Southeast Asia. In the CPA, Hong Kong and other nearby countries, whose resources were severely taxed by the arrival of those migrants, agreed to allow the boat people to land and to permit processing by international organizations of the migrants' claims to refugee status. In return, the international community agreed that migrants found not to be genuine refugees should return to Vietnam and should pursue emigration from Vietnam through regular departure programs. The signatories to the CPA expressed a strong preference for voluntary repatriation of the migrants. See CPA §§ II.B and II.C (Gov't C.A. Br. Addendum). Without the express commitment of the United States and other nations to the repatriation of Vietnamese migrants found not to be genuine refugees, Asian governments likely would not have agreed to grant temporary refuge to the boat people, or would not have allowed the screening of boat people for refugee status within their territories.

The decision below threatens to derail the operation of this program just as it approaches a successful conclusion. The signatories to the CPA hope to resettle or repatriate all Vietnamese migrants by June 1996 (when the CPA is scheduled to terminate formally), or by the end of 1996 at the latest. If the United States Consulate General in Hong Kong is required to accept visa applications from screened-out Vietnamese nationals there, those Vietnamese are unlikely to cooperate with the voluntary repatriation

program established in the CPA. Indeed, since (as the court of appeals stated, see note 7, *supra*) Vietnamese nationals denied visas by the United States Consulate General in Hong Kong can reapply, even those migrants who are denied visas will have no incentive to return to Vietnam rather than remain in Hong Kong, if the Consulate General is required to accept their renewed applications.

The prospect that voluntary repatriation will be disrupted has provoked considerable concern on the part of other signatories to the CPA, including Hong Kong, which reverts to Chinese administration on July 1, 1997. As noted above (pp. 7-8, *supra*), the British Foreign Minister appealed to the Secretary of State to reaffirm the United States Government's commitment to the CPA, the ASEAN nations expressed particular concern that the voluntary repatriation of Vietnamese nationals not be impeded, and the CPA steering committee reaffirmed its commitment to voluntary repatriation. The United States Government joined in the CPA steering committee's consensus in favor of unimpeded operation of the CPA. The United States' express policy not to accept visa applications from screened-out migrants outside Vietnam was established and publicized to send an unequivocal message to those migrants that they must return to Vietnam if they wish to apply for ultimate resettlement in the United States.

b. The decision below has consequences well beyond the operation of the CPA. First, it throws into doubt the ability of the United States Government to enter into similar arrangements with other countries in the event of future migration crises. It thus deprives the United States of a useful and flexible foreign policy tool, and it needlessly interferes with

the ability of the international community to respond to uncontrolled mass migration.

Second, the decision below also casts doubt on the authority of the State Department to establish policies that require special procedures for visa applications by nationals of certain countries, or require nationals of countries where the Department does not have consular officers to apply for visas at certain consular posts. Those policies in many cases are based on operational and management needs that change over time; in some cases, they reflect national security concerns. For example, terrorism may be a problem identified with a particular country, such that visa applications from nationals of that country require special processing. As a result of the court of appeals' decision, the Department's visa processing policies will be subject to judicial scrutiny to determine whether they discriminate on the basis of nationality. That result is an unwarranted (as well as unwise) intrusion into the State Department's conduct of the visa function.

Third, the panel's ruling on reviewability opens a broad new avenue of judicial review of consular decisions at the behest of persons in the United States who claim to be affected by such decisions. Under the logic of that ruling, not just immediate relatives of aliens seeking admission, but also United States employers sponsoring admission of aliens, will now be able to sue to seek overturn an adverse visa decision; indeed, in the *Lisa Le* case, the plaintiffs include a sponsoring employer. See App., *infra*, 72a-73a (plaintiff Vietnamese Catholic Ministry). The reviewability ruling therefore has ramifications for innumerable visa decisions well beyond those in this case, and accordingly warrants review by this Court.

3. Although no other court of appeals has yet addressed whether consular venue rules are subject to the anti-discrimination rule of Section 202(a)(1), we submit that, in the circumstances presented here, the absence of a circuit conflict on that issue does not counsel against review by this Court. The District of Columbia Circuit is, in effect, a court with nationwide venue in controversies involving the Department of State. Any disappointed visa applicant can challenge the Department's consular venue rules by having the sponsoring relative or employer file an action in the United States District Court for the District of Columbia and there gain advantage of the decision below, which will be binding precedent in that court. Indeed, that has already occurred; after the panel issued its decision in this case in February 1995, 26 more Vietnamese nationals in Hong Kong, joined by their sponsors in the United States, filed the companion *Lisa Le* suit in that district court, which issued injunctions against the enforcement of the policy at issue here. See p. 13, *supra*.

The court of appeals recognized the fundamental importance of the issues presented by this petition when it granted initial en banc review in *Lisa Le*. The decision of the en banc court may eventually make it unnecessary for this Court to grant plenary review of the questions presented in this petition. If the en banc court of appeals holds that judicial review is unavailable or upholds the consular venue policy on the merits, it might then choose to vacate the panel decision in this case. Thus far, however, the panel that issued the decision below has declined to vacate its decision pending the outcome of the en banc hearing in *Lisa Le*, and has also declined to stay the issuance of its mandate beyond March 21, 1996. If the

mandate issued, this case would return to the district court for class certification proceedings, pursuant to the terms of the remand ordered by the panel. See App., *infra*, 47a.

We have therefore filed this petition to preserve our ability to gain review of the decision below, and to continue the stay of the mandate under Federal Rule of Appellate Procedure 40(b), thereby preventing the case from returning to the district court for inappropriate class certification proceedings. If the decision of the en banc court in *Lisa Le* should be adverse to the government, we would expect to seek plenary review of that decision (along with the panel's decision in the instant case) in this Court. On the other hand, if the en banc court rules in the government's favor in *Lisa Le*, the Court could then grant the certiorari petition in this case, vacate the judgment of the court of appeals, and remand the case to that court for further consideration in light of its intervening decision in *Lisa Le*. For now, given that the en banc court of appeals is currently considering the same issues, we suggest that the Court hold this petition until the court of appeals renders its decision, and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision of the en banc court of appeals in *Lisa Le* v. *United States Department of State, Bureau of Consular Affairs*, No. 95-5425 (D.C. Cir.), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

MICHAEL JAY SINGER
ROBERT M. LOEB
Attorneys

MARCH 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5104

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS; THUA VAN LE; EM VAN VO; THU HOA THI DANG; TRUC HOA THI VO, APPELLANTS

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., APPELLEES

[Filed: Feb. 3, 1995]

Before: EDWARDS, Chief Judge, and SENTELLE and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

Dissenting opinion filed by Circuit Judge RANDOLPH.

SENTELLE, Circuit Judge:

This is an appeal from a grant of summary judgment by a not-for-profit corporation, Legal Assistance for Vietnamese Asylum Seekers, Inc.

("LAVAS"); two detained Vietnamese immigrants in Hong Kong; and their American citizen sponsors, against the United States Department of State and various government officials in their official capacities (collectively "the State Department" or "Department"). Appellants allege the State Department violated its own regulations as well as the Immigration and Nationality Act when refusing to process the visa applications of Vietnamese immigrants, who had not been screened in as political refugees, at the United States Consulate in Hong Kong. Because we find the district court erred in granting summary judgment in favor of appellees, we reverse and remand.

I. BACKGROUND

Since April 1975, when the North Vietnamese captured Saigon, large numbers of refugees have fled Vietnam to Hong Kong. Between June 1979 and June 1988, the treatment of these persons was guided by an informal agreement under which Hong Kong and other nations in the region committed themselves to granting temporary refuge in exchange for a commitment from the United States and other western countries to resettle these immigrants. As part of this agreement, the Hong Kong Government accorded these immigrants presumptive refugee status.

However, due to an increase in the number of persons fleeing Vietnam in the late 1980s, the Hong Kong Government announced it was revoking the presumptive refugee status of the Vietnamese immigrants as of June 15, 1988. Thereafter, all new arrivals would be detained and screened by local immigration authorities to determine whether they individually qualified for refugee status. In June

1989, this approach was adopted throughout the region in the form of a Comprehensive Plan of Action ("CPA"), a joint statement of policy also adopted by the United States. The CPA provides that asylum seekers who are screened out, that is those who do not qualify as refugees under the criteria established in the Refugee Convention, should return to Vietnam. Once returned, those eligible for immigrant visas may apply through the Orderly Departure Program, established to provide for the departure of Vietnamese directly from Vietnam to their resettlement destinations.

The United States permits Vietnamese immigrants, who have as sponsors close relatives who are United States citizens or permanent resident aliens in the United States, to enter as beneficiaries of immigrant visas under the criteria set forth in the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1151-1156 (1988). To obtain a visa, eligible Vietnamese immigrants and their sponsors must complete several steps. First, the sponsor must file a petition with the Immigration and Naturalization Service ("INS"). 8 C.F.R. § 204.1(a) (1994). If the INS approves the petition, the Vietnamese applicant must complete and submit to the United States State Department an application for an immigrant visa. 22 C.F.R. § 42.63(a) (1994). Third, the applicant must provide various documents to a United States consulate, and appear at the consulate for final processing of the visa application. 22 C.F.R. § 42.62(a) (1994).

From June 1979 to April 1993, the State Department processed applications for Vietnamese boat people in Hong Kong at the United States consulate. Although the Department directed its posts in

November 1991 to advise screened out applicants to return to Vietnam, the United States consulate in Hong Kong ignored this change in policy. The consulate continued to process the visa applications from screened out Vietnamese. To facilitate this processing, the Consulate General issued letters to the Hong Kong Government requesting that Vietnamese be made available for interviews at the consulate.

In April 1993, however, after an exchange of cables in which the United States consulate in Hong Kong argued it should be permitted to continue processing those immigrants who had been screened out, the Department specifically instructed the consulate to cease such activity. Applicants who had been screened out were thus required to return to Vietnam for visa processing. The United States consulate officially informed the Hong Kong Government of the policy change on September 24, 1993.

On February 25, 1994, appellants brought this action against the State Department and various officials. Appellants sought declaratory and injunctive relief on behalf of a class of Vietnamese nationals desiring to be processed at the United States consulate in Hong Kong, yet who were instructed they would have to return to Vietnam for processing. Appellants also sought such relief on behalf of a class of sponsoring United States citizens and permanent residents who were related to the detained plaintiffs.

Appellants alleged that the State Department's change in policy was in violation of the INA and the regulations promulgated thereunder, the Administrative Procedure Act ("APA"), and the United States Constitution. Following a hearing consolidating appellants' application for a preliminary injunction with the trial of the action on its merits, the district court

issued a final order on April 28, 1994, granting the State Department's motion for summary judgment and denying appellants' cross motion for summary judgment.

II. DISCUSSION

As a threshold issue, appellees contend all of the appellants lack standing to bring this action. The APA grants standing to any party who is "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1988). *See National Fed'n of Fed. Employees v. Cheney*, 883 F.2d 1038, 1042 (D.C.Cir.1989). The party must suffer injury in fact, and the interest sought to be protected must arguably be within the zone of interests protected by the statute in question. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 395-96, 107 S.Ct. 750, 754-55, 93 L.Ed.2d 757 (1987). We first address the issue of whether the sponsoring resident appellants possess standing. Appellants argue these plaintiffs suffer the requisite injury in fact and are within the zone of interest protected by the INA.

We agree. First, as to injury in fact, the State Department's conduct prolongs the separation of immediate family members. The detained appellants must either remain in Hong Kong, where they are denied the opportunity to be processed, or, if they are required first to return to Vietnam, their processing will be further delayed. We have previously found injury in fact where the plaintiffs were far less aggrieved than in the case at bar. *See, e.g., Abourezk v. Reagan*, 785 F.2d 1043, 1050-51 (D.C.Cir.1986) (holding American plaintiffs possess standing where the State Department denied visas to aliens wishing

to visit the United States to attend meetings at the behest of these plaintiffs).

Second, the resident appellants are within the zone of interest protected by the INA. As the Supreme Court held in *Clarke*, the zone of interest test does not necessarily require a specific congressional purpose to benefit the would-be plaintiff. It is sufficient if the plaintiffs "'establish that their *particular* interest[ ]'" falls within the area of interests Congress intended to protect. *National Fed'n of Fed. Employees*, 883 F.2d at 1047 (quoting *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 812 (D.C.Cir.1987)). The INA authorizes the immigration of family members of United States citizens and permanent resident aliens. 8 U.S.C. §§ 1151-1156. In originally enacting the INA, Congress "implement[ed] the underlying intention of our immigration laws regarding the preservation of the family unit." H.R.Rep. No. 1365, 82d Cong., 2d Sess. (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680. Given the nature and purpose of the statute, the resident appellants fall well within the zone of interest Congress intended to protect.

Appellees also contend that neither LAVAS nor the detained appellants in Hong Kong have standing. We need not reach this issue. If one party to an action has standing, a court need not decide the standing issue as to other parties when it makes no difference to the merits of the case. *See Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 810 (D.C.Cir.1993) (per curiam).[1]

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[1] We do not address the additional threshold question of mootness raised by the dissent because we do not view it as being properly in the case. No party has suggested that the

We now turn to the merits of the appeal. Appellants allege the State Department's refusal to process the visas of the detained appellants in Hong Kong violates 22 C.F.R. § 42.61(a) of the Department's visa regulations. The regulation concerns the circumstances under which an immigrant seeking a visa can have his case processed in a given consular district. The parties dispute the proper interpretation of this regulation, but we need not construe the version of the regulation in effect at the time the dispute arose because it has been rendered moot by 1994 amendments to 22 C.F.R. § 42.61(a). Visa applicants have no vested right in the issuance of a visa. *De Avilia v. Civiletti*, 643 F.2d 471, 477 (7th Cir.1981). They are certainly not entitled to prospective relief based on a no longer effective version of a later amended regulation. It is the amended version which will now govern

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case is moot on the basis asserted by the dissent nor do we understand the dissent to be asserting that the case is moot. The dissent from a reading of the facts determines that the case might possibly be moot and therefore, in the view of the dissent, should have been remanded. Unlike the dissent we find no authority for the proposition that we should remand a case upon our discovery of grounds that might possibly render the case moot. *Johnson v. New York State Education Department*, 409 U.S. 75, 76, 93 S.Ct. 259, 259, 34 L.Ed.2d 290 (1972) (per curiam), did not involve a suggestion that the case *might* be moot. The suggestion in *Johnson* was that the facts were such that the case had in fact become moot. The Supreme Court unremarkably remanded for a determination as to whether the facts were as represented. The suggestion by the dissent in the present case is that the facts *may* have changed so as to make the case moot after the hearing below. Such a speculative possibility not raised by any party to the case could be asserted in a wide array of cases but has never been the basis of a remand to our knowledge.

the admission of the detained Vietnamese, and it is that version we must construe:

> (a) *Alien to apply in consular district of residence.* Unless otherwise directed by the Department, an alien applying for an immigrant visa shall make application at the consular office having jurisdiction over the alien's place of residence; except that, unless otherwise directed by the Department, an alien physically present in an area but having no residence therein may make application at the consular office having jurisdiction over that area if the alien can establish that he or she will be able to remain in the area for the period required to process the application. . . .

59 Fed.Reg. 39,955 (1994) (to be codified at 22 C.F.R. § 42.61).

Under this regulation, an alien desiring a visa shall apply at the consular office where he resides. Alternatively, an alien physically present in an area has the option of applying at the consular office having jurisdiction over that area if he satisfies a precondition.[2] However, asserting its authority under the regulation to "direct otherwise," the Department has ceased processing Vietnamese immigrants in Hong Kong at the consular office. Nationals of other countries not subject to the CPA are still processed at the consular office.

Although appellees' regulation permits this differing treatment, appellants claim the discrimination violates 8 U.S.C. § 1152(a) of the INA. This section provides "no person shall . . . be discriminated

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[2] We need not distinguish the terms "reside" and "physically present" for purposes of this appeal.

against in the issuance of an immigrant visa because of the person's . . . nationality . . . or place of residence." Appellants argue that the Department violated the statute in drawing an explicit distinction between Vietnamese nationals and nationals of other countries when refusing to process the visas of the screened out Vietnamese immigrants. Appellants assert this statute compels this court to invalidate any attempt to draw a distinction based on nationality in the issuance of visas. In contrast, appellees urge us to adopt the position that so long as they possess a rational basis for making the distinction, they are not in violation of the statute. Appellees maintain the goal of encouraging voluntary repatriation and the aims of the CPA certainly provide a rational basis for the practices and policies in question.

We agree with appellants' interpretation of the statute. Congress could hardly have chosen more explicit language. While we need not decide in the case before us whether the State Department could never justify an exception under the provision, such a justification, if possible at all, must be most compelling—perhaps a national emergency. We cannot rewrite a statutory provision which by its own terms provides no exceptions or qualifications simply on a preferred "rational basis." *Cf. Haitian Refugee Ctr. v. Civiletti*, 503 F.Supp. 442, 453 (S.D.Fla.1980) (under 8 U.S.C. § 1152(a), INS has no authority to discriminate on the basis of national origin, except perhaps by promulgating regulations in a time of national emergency).

Appellees rely on *Narenji v. Civiletti*, 617 F.2d 745 (D.C.Cir.1979), for the proposition that their nationality-based discrimination passes muster under section 1152(a) as long as they possess a rational justifi-

cation. In *Narenji*, we upheld an INS regulation requiring nonimmigrant alien students in the United States who were natives or citizens of Iran to report to an INS office to provide information concerning their nonimmigrant status. *Id.* at 746-47. The INA delegated to the Attorney General the authority to prescribe conditions of admission to the United States for nonimmigrant aliens. 8 U.S.C. § 1184(a). The INA also authorized the Attorney General to order the deportation of any nonimmigrant alien who failed to comply with the conditions of his status. 8 U.S.C. § 1251(a)(9). We held that a broad mandate of the INA delegating to the Attorney General the authority to prescribe conditions of admission to the United States on the part of nonimmigrant aliens authorized the Attorney General to draw distinctions among nonimmigrant aliens on the basis of nationality. *Narenji*, 617 F.2d at 747. We then examined whether the regulation violated the Constitution. In finding no violation, we stated that we would sustain classifications on the basis of nationality drawn by the Congress or the Executive in the immigration field, so long as they were not wholly irrational. *Id.* Appellants argue that *Narenji* compels us to sustain the distinctions drawn in the present regulations.

Appellees' reliance on *Narenji* is misplaced. In that case the court was considering the power of the Immigration and Naturalization Service to promulgate nationality-based regulations and the constitutionality of such regulations if otherwise properly promulgated. Under constitutional standards we found no equal protection violation. *Id.* at 748. The *Narenji* court did not consider the effect on the agency regulatory authority to make distinctions of a statute flatly forbidding nationality-based discrimination. Here the agency's nationality-based regulation runs athwart such a statute. The appellees' proffered statutory interpretation, leaving it fully possessed of all its constitutional power to make nationality-based distinctions, would render 8 U.S.C. § 1152(a) a virtual nullity.

Section 1152 is a part of the Immigration and Nationality Act. This is an act committed to the administration of the Immigration and Naturalization Service and we review its interpretations deferentially under the standard of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984). Even under that standard the Service's present interpretation fails. Where Congress has unambiguously expressed its intent, we need go no further. Here, Congress has unambiguously directed that no nationality-based discrimination shall occur. There is no room for the Service's interpretation proffered by the Department.

Under the APA, this court is obligated to hold unlawful and set aside agency action found to be not in accordance with law. 5 U.S.C. 706(2)(A) (1988). The interpretation and application of the regulation so as to discriminate against Vietnamese on the basis of their nationality is in violation of the Act, and therefore not in accordance with law.

The dissent's contention that the distinction drawn by the Department is the permissible line between legal and illegal immigrants as opposed to the impermissible nationality-based line between Vietnamese and non-Vietnamese illegal immigrants is simply not supported by the record. The case reaches us on appeal from summary judgment At the summary judgment stage in the district court, the defendants

expressly stated in their "Statement in Response to Plaintiffs' Statement of Material Facts as to which there is no Genuine Dispute," that "in approximately April, 1993, the Department changed its practice or policy relating to the processing of immigrant visa petitions of *Vietnamese nationals* residing illegally in Hong Kong." (Joint Appendix 353) (emphasis added). The Department has never contended here or in the district court that this change was made as to any other nationals than Vietnamese nationals nor that illegally present nationals of other countries would be treated the same as illegally present Vietnamese nationals. We neither hold nor imply that any statute requires that the same treatment be afforded legal and illegal status.

III. CONCLUSION

Accordingly, we reverse the district court's grant of summary judgment in favor of appellees and remand the case for a disposition consistent with this opinion.

It is so ordered.

RANDOLPH, Circuit Judge, dissenting:

My objections to the majority opinion are, first, that the decision on the merits is in error, and second, that the prospect of mootness should have precluded any decision on the merits. I realize that discussing the issues in this sequence inverts the usual order. But the majority's mistake on the merits is the more serious in terms of lasting consequences and I shall therefore begin with it.

The British crown colony of Hong Kong is one of the most densely populated regions in the world. Within its tiny area, nearly six million people reside. Because of Hong Kong's proximity to Vietnam it has become one of the prime destinations for Vietnamese "boat people," more than 750,000 of whom have fled to the countries of Southeast Asia during the past nineteen years. After the fall of Saigon in 1975, the United States pressed "first asylum" countries such as Hong Kong to provide a safe haven for these people until they could be resettled elsewhere or returned to Vietnam. But as the years passed, the influx of boat people continued. Since June 1988, more than 71,000 individuals from Vietnam have arrived on Hong Kong's shores and wound up in its detention camps. In an effort to stem the tide and to relieve itself of the burdens imposed by this mass exodus, Hong Kong entered into a Comprehensive Plan of Action with fifty other nations, including the United States. Developed in 1989, the Plan governs the screening of asylum seekers and provides that those persons not recognized as "refugees" pursuant to international criteria—those who have been "screened out"—must return to Vietnam in order to seek resettlement in a third country.

For the moment, Hong Kong and the other "first asylum" countries are exercising forbearance. They are following a program of voluntary repatriation for those who have been "screened out." Hong Kong is, in other words, asking these people to depart voluntarily rather than forcibly expelling them, as it presumably has every right to do since they are there illegally. The head of the State Department's Bureau of Refugee Programs believes that it is "fundamentally important to the success" of the Comprehensive Plan that "Vietnamese in the camps have the clear perception that there is no alternative for the screened out but to return to Vietnam." "[A]nything that clouds that perception or gives birth to rumors that resettlement of the screened out is possible will reduce voluntary repatriation and create a situation in which resort to mandatory repatriation by first asylum governments is made more likely."

The potential repercussions of the majority's decision are, to say the least, disquieting. The flight of illegal aliens to Hong Kong and elsewhere has created an international crisis. Fifty nations have sought to avert the flood by stopping the flow. Not processing their visas in Hong Kong removes one of the reasons so many of these people are leaving their homeland and embarking on the dangerous journey across the South China Sea. Now the majority holds that it is illegal for the United States consular office in Hong Kong to abide by the Comprehensive Plan and refuse to process immigrant visas for Vietnamese boat people detained in the camps. Why? Because this is discrimination on the basis of nationality and 8 U.S.C. § 1152 provides, with certain exceptions, that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's

race, sex, nationality, place of birth, or place of residence."

But it is not nationality that precludes visa processing. The so-called "discrimination" the majority detects stems from the illegal status of the screened out boat people, rather than from the fact (if it is a fact) that they are all Vietnamese nationals. Compare two Vietnamese nationals in Hong Kong, one there illegally and currently living in a detention camp and the other there legally, perhaps working or on holiday. As implemented, the current regulation allows processing of the legal Vietnamese but not the illegal one. That is not discrimination on the basis of nationality, but discrimination on the basis of legality. And the statute does not forbid it. Still less is the State Department's current regulation a "nationality based regulation," as the majority supposes. The regulation reads:

> (a) *Alien to apply in consular district of residence.* Unless otherwise directed by the Department, an alien applying for an immigrant visa shall make application at the consular office having jurisdiction over the alien's place of residence; except that, unless otherwise directed by the Department, an alien physically present in an area but having no residence therein may make application at the consular office having jurisdiction over that area if the alien can establish that he or she will be able to remain in the area for the period required to process the application. . . .

59 Fed.Reg. 39,955 (1994) (to be codified at 22 C.F.R. § 42.61). There is not a word here relating to an alien's nationality. Within the United States illegal aliens are treated far differently than those who are

legally here. It is beyond belief that distinguishing—that is, discriminating—among visa applicants on the same ground is forbidden. The regulation, through the words "unless otherwise directed," permits the State Department to make this distinction and section 1152 does not forbid it.

To show that the State Department was discriminating against the detainees because they were Vietnamese, the majority quotes a statement of the defendants and italicizes two words: "in approximately April, 1993, the Department changed its practice or policy relating to the processing of immigrant visa petitions of *Vietnamese nationals* residing illegally in Hong Kong." Consider the quotation again, this time without the distracting italics. It indicates that the State Department's policy dealt only with those Vietnamese "residing illegally in Hong Kong." That makes my point, not the majority's. Other Vietnamese in Hong Kong may be processed. What causes the difference in treatment? Not nationality, but the common sense international distinction between aliens who enter a country illegally and those who enter legally.

There may be room for an argument that the State Department will process other illegal immigrants—that is, other than the Hong Kong detainees—in foreign countries despite their illegal status, and therefore the Vietnamese boat people are being singled out because they are Vietnamese. But there is no evidence that this sort of thing is going on; and the regulation is so new that I doubt whether any world-wide customary practice under it can yet be discerned.

Given the profound consequences of judicial intervention and the danger that a decision might dis-

mantle this carefully wrought international program designed to bring a humane and swift end to the continuing problem of illegal immigration, it is critical that we decide only what we have to decide. The majority has followed another course, which brings me to my second objection. Of the five plaintiffs, two are—or were—screened out Vietnamese residing in one of the Hong Kong camps. The oral argument in this case revealed that these alien-plaintiffs may have already been processed. Their preference numbers came up nearly a year ago. *See Kooritzky v. Reich*, 17 F.3d 1509, 1510-11 (D.C.Cir.1994). At the time of the district court's decision—April 1994—the State Department was still processing detainees whose visa applications were current, that is, those whose preference numbers had been reached. It therefore appears quite likely that the alien-plaintiffs are now in the United States. If they are, their two sponsors, who are also plaintiffs, have no further interest in the case. The case was never certified as a class action. The district court made no findings regarding the status of the alien-plaintiffs and neither the plaintiffs' nor the government's counsel at oral argument could say whether a live controversy still exists.

If the alien-plaintiffs have already received relief, the case could not be saved by qualifying as one capable of repetition but evading review. The capable of repetition part of the formulation means the complaining party is likely to be subjected to the same challenged activity in the future. We so held in *Christian Knights of the Ku Klux Klan v. District of Columbia*, 972 F.2d 365, 370 (D.C.Cir.1992), citing several Supreme Court decisions on the point. If the individual Hong Kong plaintiffs already had their

applications processed, they will not suffer the same fate in the future.

Without the aliens or their sponsors in the case, our deciding the merits would be warranted only if the remaining plaintiff, LAVAS, had standing, which it does not. The harm it alleges—a possible future strain on its resources—is general and speculative, *see Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); and the organization is not within the zone of interest the statute was meant to protect, *cf. INS v. Legalization Assistance Project of the Los Angeles County Fed'n of Labor*, ___U.S.___, ___, 114 S.Ct. 422, 424, 126 L.Ed.2d 410 (1993) (Circuit Justice O'Connor).

The proper course therefore should have been to remand the case to the district court to make a finding whether the case is moot. We do not have to be entirely certain the case has become moot; if there is cause to believe it has met that fate, a remand is warranted. That is what the Supreme Court does when it encounters this sort of situation. *See, e.g., White v. Regester*, 422 U.S. 935, 936, 95 S.Ct. 2670, 2671, 45 L.Ed.2d 662 (1975) (per curiam); *Hill v. Printing Indus. of the Gulf Coast*, 422 U.S. 937, 938, 95 S.Ct. 2670, 2670, 45 L.Ed.2d 664 (1975) (per curiam); *Indiana Employment Security Div. v. Burney*, 409 U.S. 540, 541-42, 93 S.Ct. 883, 883-85, 35 L.Ed.2d 62 (1973) (per curiam); *Johnson v. New York State Educ. Dep't*, 409 U.S. 75, 76, 93 S.Ct. 259, 259, 34 L.Ed.2d 290 (1972) (per curiam) ("[G]iven the suggestion at oral argument . . . the case is remanded to the [district court] to determine whether this case has become moot."). And that is what we should have done rather than rushing into the merits.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 94-361 SSH

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., DEFENDANTS

[Filed: Mar. 2, 1994]

ORDER

Before the Court is plaintiffs' application for a temporary restraining order, which was filed on February 25, 1994. In that application, plaintiffs asked that pending a hearing on their motion for a preliminary injunction, the Court enjoin defendants from "taking any further action to implement their decision to refuse processing visa applications of all Vietnamese nationals currently detained in Hong Kong who are beneficiaries of current immigrant visa petitions, including but not limited to, any further communication to the beneficiaries regarding such

decision."[1] Defendants have already instructed their consulates in Hong Kong to begin processing the immigrant visa applications of aliens detained there. Moreover, defendants have directed their officers not to advise immigrants that their applications will not be adjudicated in first asylum countries and to use their "best efforts with host country officials to see that U.S. immigrant visa petition beneficiaries are not involuntarily repatriated and that such beneficiaries who may be planning to repatriate voluntarily are informed that review is taking place." Defs.' Opp'n Exs. A-B. Therefore, the Court finds that plaintiffs have been granted at least temporarily the relief requested in their application for a temporary restraining order, and thus that plaintiffs' application is moot.

At the March 1, 1994, hearing on plaintiffs' application for a temporary restraining order, plaintiffs, through the submission of a new proposed order, asked for relief beyond that requested in their original application, and beyond that provided voluntarily by defendants. The Court questions whether this request is properly before the Court in this posture. Nevertheless, assuming the modified request is properly treated as a new application for a temporary restraining order, the Court finds that the factors set forth in *National Treasury Employees Union v. United States*, 927 F.2d 1253, 1254 (D.C. Cir. 1991) (quoting *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1208 (D.C. Cir. 1989)), have not been satisfied so as now to warrant injunctive relief. Accordingly, it hereby is

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[1] Analytically, such a request does not seek to "restrain" anything; it seeks affirmative injunctive relief.

ORDERED, that plaintiffs' application for a temporary restraining order is denied. It hereby further is

ORDERED, that defendants' opposition to plaintiffs' motion for a preliminary injunction and defendants' dispositive motion shall be filed on March 15, 1994; plaintiffs' reply/opposition shall be filed on March 29, 1994; and defendants' reply shall be filed on April 5, 1994. It hereby further is

ORDERED, that the combined hearing pursuant to Fed. R. Civ. P. 65(a)(2) on plaintiffs' motion for a preliminary injunction and the merits is scheduled for April 7, 1994, at 5:00 p.m., in courtroom 14.

SO ORDERED.

/s/ *Stanley S. Harris*
Stanley S. Harris
United States District Judge

Date: MAR 2 1994

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5046

SEPTEMBER TERM, 1993 94CV00361

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS; THUA VAN LE; EM VAN VO; THU HOA THI DANG; TRUC HOA THI VO, APPELLANTS

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS; WARREN CHRISTOPHER, SECRETARY OF STATE, ET AL.

[Filed: Mar. 6, 1994]

ORDER

BEFORE: EDWARDS, GINSBURG, and SENTELLE* Circuit Judges

Upon consideration of the motion for expedited consideration, the emergency motion for relief pending appeal, the response thereto, and the reply, it is

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* Judge Sentelle would dismiss the appeal because in his view this court does not have jurisdiction over the denial of a temporary restraining order. *See Office of Personnel Management v. American Federal of Government Employees, AFL-CIO*, 473 U.S. 1301, 1305 (Burger, Circuit Justice 1985).

ORDERED that the request for preliminary injunctive relief be granted. The appellees are hereby enjoined to take all necessary and proper action to ensure that appellants are not repatriated until the district court proceedings have been completed. Appellants have asserted violations of statutory rights conferred by 22 C.F.R. § 42.61(a) ("Under ordinary circumstances an alien seeking an immigration visa shall have the case processed in the consular district in which the alien resides."); the Immigration and Nationality Act, 8 U.S.C. § 1152 ("No person shall . . . be discriminated against in the issuance of an immigration visa because of the person's race, sex, nationality, place of birth, or place of residence."); and the Administrative Procedures Act, 5 U.S.C. § 553 (rulemaking requires notice and comment). They further claim that forced repatriation will irreparably harm their efforts to emigrate. On balance the equities favor the granting of injunctive relief. *See Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972 (D.C. Cir. 1985) (per curiam). It is

FURTHER ORDERED that this case be remanded to the district court for further proceedings. The injunction shall remain in place pending completion of the district court proceedings.

The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Ron H. Garvin, Clerk

By: /s/ Cheri Carter
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 94-361 SSH

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., DEFENDANTS

[Filed: Apr. 28, 1994]

MEMORANDUM ORDER

This case is before the Court on plaintiff's application for a preliminary injunction and on cross-motions for summary judgment.[1] With the agree-

[1] The case presently is in a strange posture. On March 2, 1994, the Court denied plaintiff's application for a temporary restraining order. *Legal Assistance For Vietnamese Asylum Seekers v. United States Dep't of State*, CA No. 94-361 (D.D.C. Mar. 2, 1994). Although the Supreme Court found it necessary to point out to the Court of Appeals that it has no jurisdiction over a trial court's denial of a motion for a temporary restraining order, *see OPM v. American Fed'n of Gov't Employees*, 473 U.S. 1301, 1305 (Burger, Circuit Justice 1985), a

ment of the parties, the Court consolidated the hearing on the application for a preliminary injunction with the hearing on the merits pursuant to Fed. R. Civ. P. 65(a)(2). Upon consideration of the entire record, including the arguments of counsel at the hearing held on April 7, 1994, the Court grants defendants' motion for summary judgment and denies plaintiffs' motion for summary judgment. The Court also denies plaintiffs' motion for a preliminary injunction as moot. Although "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56," Fed. R. Civ. P. 52(a), the Court nonetheless briefly sets forth its analysis.

Plaintiffs challenge defendants' position that it is proper to process in Vietnam the immigrant visa applications of those Vietnamese asylum-seekers denied refugee status by the Hong Kong government. Plaintiffs contend that this policy is contrary to the Immigration and Nationality Act ("INA"), and the regulations promulgated thereunder, the Administrative Procedure Act ("APA"), and the United States Constitution. Defendants presently are processing the applications of current immigration visa petition beneficiaries in Hong Kong, subject to agreement by the Hong Kong government to make the detainees available, and thus voluntarily have granted plaintiffs part of the relief they seek. Plaintiffs also request, however, a permanent injunction directing defendants "to take all necessary and proper action to facilitate and expedite processing

majority of a panel of the Court of Appeals rather extraordinarily granted preliminary injunctive relief to plaintiffs. *See Legal Assistance For Vietnamese Asylum Seekers v. United States Dep't of State*, No. 94-5046 (D.C. Cir. Mar. 6, 1994).

and to otherwise eliminate the effects of [defendants'] illegal policy." Pls.' Mot. for Summ. J. at 3.

Defendants assert that plaintiffs' complaint presents a nonjusticiable political question because an order granting plaintiffs' proposed relief would intrude into the areas of foreign affairs and immigration policy. The Court is inclined to agree. *See Baker v. Carr*, 369 U.S. 186 (1962); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1548-49 (D.C. Cir. 1984) (en banc) (Tamm, J., dissenting), *vacated on other grounds*, 471 U.S. 1113 (1985); *Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978).

Because an allegation of nonjusticiability is a jurisdictional question, this determination should end the Court's inquiry. *Id.* at 954 n.7. The Court finds, however, that more recent precedent makes the issue a close one. *See DKT Memorial Fund, Ltd. v. Agency for Int'l Dev.*, 810 F.2d 1236 (D.C. Cir. 1987); *Population Inst. v. McPherson*, 797 F.2d 1062 (D.C. Cir. 1986); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985). Therefore, because the merits of the case are clear, the Court resolves the merits without reaching the jurisdictional issue. *See Adams v. Vance*, 570 F.2d at 954 n.7.[2]

Plaintiffs argue that defendants' failure to process the detained plaintiffs' immigrant visas in Hong Kong violates regulations promulgated pursuant to Section

[2] The Court rejects defendants' argument that plaintiffs lack standing. *See Valley Forge Christian College v. Americans United for Separation of Church and States, Inc.*, 454 U.S. 464 (1982); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970).

222 of the INA, 8 U.S.C. § 1202(a).[3] The regulations state:

> Under ordinary circumstances, an alien seeking an immigrant visa shall have the case processed in the consular district in which the alien resides. The consular officer shall accept the case of an alien having no residence in the consular district, however, if the alien is physically present and expects to remain therein for the period required for processing the case. An immigrant visa case may, in the discretion of the consular officer, or shall, at the direction of the Department, be accepted from an alien who is neither a resident of nor physically present in, the consular district.

22 C.F.R. §§ 42.61. Defendants have determined that the situation of the detained Vietnamese asylum-seekers in Hong Kong is not an "ordinary circumstance."[4] This policy choice is entitled to deference. "The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by Congress or the President in the area of immigration and naturalization." *Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (quoting *Mathews v.*

[3] Plaintiffs also argue that the failure to process constitutes an arbitrary and capricious change in policy, as well as unlawful discrimination on the basis of national origin. In addition, they argue that defendants violated the notice and comment provisions of the APA. The Court finds these arguments meritless.

[4] Plaintiffs assert that the phrase "under ordinary circumstances" affords consular officers discretion in extraordinary circumstances to process the visa applications of non-resident aliens. The Court finds that this reading of the regulation would render the third sentence superfluous, and hence is invalid.

Diaz, 426 U.S. 67, 81-82 (1976)). Thus the Court finds that the failure to process the immigrant visa applications of Vietnamese asylum-seekers denied refugee status in Hong Kong does not violate the INA and the regulations promulgated thereunder. Accordingly, it hereby is,

ORDERED, that defendants' motion for summary judgment is granted and plaintiffs' motion for summary judgment is denied. It hereby further is

ORDERED, that plaintiffs' motion for a preliminary injunction is denied as moot. It hereby further is

ORDERED, that plaintiffs' motion for class certification is denied as moot.

SO ORDERED.

/s/ STANLEY S. HARRIS
STANLEY S. HARRIS
United States District Judge

Date: APR 28 1994

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5104

SEPTEMBER TERM, 1994 (94CV00361)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS; THUA VAN LE; EM VAN VO; THU HOA THI DANG; TRUC HOA THI VO, APPELLANTS

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed: May 9, 1995]

ORDER

BEFORE: EDWARDS, *Chief Judge*, and SENTELLE and RANDOLPH, *Circuit Judges*.

Upon consideration of appellees' petition for rehearing, appellants' response thereto, and appellees' motion for leave to file a reply, it is

ORDERED that appellees' motion for leave to file a reply be granted. The parties disagree as to whether this case is moot, and because resolution of the dispute may require the evaluation of evidence presented by the parties, it is

FURTHER ORDERED that the record of this case be remanded to the District Court for a determination of mootness. It is

FURTHER ORDERED that the petition for rehearing be held in abeyance until the District Court has determined the issue of mootness.

Per curiam
For the Court:

/s/ Robert A. Bonner

By: Robert A. Bonner
Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 94-361 SSH

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., DEFENDANTS

[Filed: Sept. 11, 1995]

MEMORANDUM OPINION

The facts of this case are set out in the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Legal Assistance for Vietnamese Asylum Seekers ("LAVAS") v. United States Department of State, Bureau of Consular Affairs*, 45 F.3d 469 (D.C. Cir. 1995). In brief, the procedural posture of this case is as follows: on February 25, 1994, plaintiffs filed a com-plaint, a motion for class certification, and a motion for a temporary restraining order and a preliminary injunction against defendants. On March 2, 1994, this Court

denied plaintiffs' motion for a temporary restraining order, and the Court thereafter consoli-dated plaintiffs' motion for a preliminary injunction with a determination on the merits.[1] On April 28, 1994, the Court granted defendants' motion for summary judgment, finding that defendants' policy of not processing at the United States Consulate in Hong Kong the immigrant visa applications of Vietnamese asylum-seekers who had been determined by the Hong Kong government not to qualify for refugee status did not violate the Constitution, the APA, or the Immigration and Nationality Act ("INA") or any regulations promulgated thereunder. The Court denied plaintiffs' motion for class certification as moot in the same Memorandum Order granting defendants' motion for summary judgment.

On February 3, 1995, the Court of Appeals reversed this Court's decision. *LAVAS*, 45 F.3d 469. A majority of the panel found that the Department of State's (hereinafter "DoS") policy of refusing to process the immigrant visa applications of "screened-out" Vietnamese asylum-seekers violated the INA because the policy constituted discrimination on the basis of nationality. *Id.* at 471-73. Judge Randolph dissented, contending that the DoS's policy did not

[1] Curiously, the Court of Appeals exercised jurisdiction over plaintiffs' appeal from this Court's denial of their motion for a temporary restraining order and ordered that defendants "take all necessary and proper action to ensure that [plaintiffs] are not repatriated until district court proceedings have been completed." *See Office of Personnel Management v. American Federation of Government Employees, AFL-CIO*, 473 U.S. 1301, 1305 (Burger, Circuit Justice, 1985) (declaring specifically that a court of appeals has no jurisdiction to review the denial by a district court of a motion for temporary restraining order).

discriminate on the basis of nationality, but rather on the basis of refugee status, which distinction constituted an acceptable and legal determination. *Id.* at 475. In addition, Judge Randolph noted in his dissent that the case had probably become moot, and that at the very least, the case should be remanded to this Court for a mootness determination. *Id.* at 476.

Defendants filed a petition for rehearing *en banc*. On May 9, 1995, the Court of Appeals remanded the case to this Court for a determination of mootness, holding defendants' petition for rehearing *en banc* in abeyance until such a determination has been made. This Court requested briefing from the parties on the mootness issue. Plaintiffs responded by filing a motion for summary judgment on the mootness issue, a renewed motion for class certification, and a motion to join additional parties. Defendants filed a motion to dismiss the case on mootness grounds. Upon consideration, the Court finds, first, that the two named plaintiffs' cases have become moot; second, that plaintiff LAVAS lacks standing; and third, that the case must be declared moot.

The Individual Plaintiffs' Cases Have Become Moot

Four persons and one organization are named plaintiffs in this action.[2] Plaintiffs concede that two of the five plaintiffs' cases have become moot. The immigrant visa application of plaintiff Thu Hoa Thi Le Dang was processed by the United States Consulate in Hong Kong and was granted on July 21, 1994,

[2] Actually, the four individual plaintiffs are made up of two pairs, each consisting of one Vietnamese refugee and that refugee's sponsor in the United States.

rendering her claims and the claims of her stateside sponsor, Thua Van Le, moot.

The application of detained plaintiff Truc Hua Thi Vo was likewise processed at the United States Consulate in Hong Kong and was denied on November 30, 1994. Ms. Vo has one year from the date of denial of her immigrant visa application to supply the Consulate with additional documentation to support her application, or her application will be canceled.

Plaintiffs contend that the current status of Ms. Vo's application is such that her case cannot be moot, since the Consulate has not yet made a "final" determination to grant or deny her immigrant visa application, but has made only an "initial" determination to deny her application. Defendants argue that Ms. Vo has obtained the relief she sought—namely, that her immigrant visa application be processed by the United States Consulate in Hong Kong, rather than after a forced repatriation to Vietnam. The Court agrees with defendants. Ms. Vo has obtained the specific relief she sought and has had her application processed by the United States Consulate in Hong Kong. Plaintiffs are correct that the Consulate has not yet finally determined whether Ms. Vo's immigrant visa application will be granted or denied, but the relief Ms. Vo sought from this Court—the processing of her application in Hong Kong instead of Vietnam—has been achieved. (The Court has, of course, no power to review a final determination of the Consulate as to the merits of Ms. Vo's immigrant visa application.) Ms. Vo's claims, and those of her citizen-sponsor, Em Van Vo, are therefore moot.

Plaintiffs argue that the opinion of the D.C. Circuit in *City of New York v. Baker*, 878 F.2d 507 (D.C. Cir.

1989), requires the Court to reach the opposite conclusion. Plaintiffs are in error. *Baker* involved a challenge to the Secretary of State's refusal to issue non-immigrant visas to certain aliens to whom plaintiffs had extended invitations to speak in the United States. Following an initial remand by the Court of Appeals to the district court for resolution of two statutory issues, Congress independently passed an amendment to the relevant statute that appeared to prohibit exclusion of the aliens on the bases initially asserted by the Secretary of State. The Court of Appeals in *Baker* held that plaintiffs' action was not rendered moot by the amendment or by the government's concession that it would not seek to exclude the alien plaintiffs from entry into the United States, noting that "the voluntary cessation of a challenged practice does not in and of itself moot a case when the party could renew it." 878 F.2d at 511-12.[3]

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[3] The court in *Baker* relied heavily on the opinion of the Second Circuit in *Allende v. Shultz*, 845 F.2d 1111 (2d Cir. 1988), in finding that the case before it was not moot. The court of appeals in *Allende*, presented with circumstances similar to those in *Baker*, held that the case before it was not moot because "the validity of [the allegedly unlawful] policy in general remains a live controversy. And since the existence of the policy continues to effect [sic] the actions of the plaintiffs who may reasonably expect that the government will oppose future plans to extend speaking invitations to [plaintiff] Allende, we find the Article III case or controversy requirement satisfied." 845 F.2d at 1115 n.7. As the court in *Allende* recognized, and as this Court notes *infra*, the pivotal issue here is not the continued presence of an allegedly unlawful regulation; rather, it is the potential that the plaintiffs will, at some point in the future, be again subjected to that allegedly unlawful regulation. No such potential exists here.

The potential that the *Baker* court recognized—namely, the potential that the DoS could "reassert its earlier position, which the government has not renounced," 878 F.2d at 511, and again exclude plaintiffs from entry into the United States—simply does not exist with respect to Ms. Vo. While the DoS has in fact reinstated its policy of not processing in Hong Kong the immigrant visa applications of non-refugee Vietnamese asylum seekers, that policy has no application to Ms. Vo or her stateside sponsor, since Ms. Vo's application already was processed by the Consulate in Hong Kong, and since her appeal from the denial of her application is also being processed in Hong Kong. Plaintiffs in effect are requesting the Court to read Baker as allowing this case to continue forward after the named plaintiffs have had the relief they seek accorded them, simply because the policy they alleged to be discriminatory was reinstated after they had been granted that relief (which means, in overall effect, that defendants "have not renounced" their position on the matter). Once put in this light, the problem with this approach becomes apparent: plaintiffs no longer have standing to contest the DoS's allegedly discriminatory policy. The Court cannot ignore simple principles of standing in favor of keeping a moribund "case or controversy" alive, when the plaintiffs no longer can allege that they are suffering or are remotely likely to suffer any injury from the allegedly discriminatory actions of defendants.

LAVAS Lacks Standing To Sue in this Action

LAVAS is, according to plaintiffs' own description, a nonprofit corporation "whose mission it is to provide legal assistance to indigent Vietnamese asylum-

seekers." *See* Certification under Rule 104(g), filed February 25, 1994. LAVAS lacks standing to raise claims challenging the DoS's policies or regulations promulgated under the INA. *See Immigration and Naturalization Service v. Legalization Assistance Project*, 114 S.Ct. 422, 424 (1993) (O'Connor, J., in chambers) (ruling that legal assistance organization which challenged INS regulations fell outside the zone of interests protected by those regulations, and that the organization therefore lacked standing); *Ayuda, Inc. v. Reno*, 7 F.3d 246, 250 (D.C. Cir. 1994) (holding that "Qualified Designated Entities" authorized to act as intermediaries between aliens and the INS had no standing to challenge INS policies interpreting aliens' rights to legalization). Therefore, LAVAS is dismissed from this suit.[4]

The Action Is Moot

With the dismissal of LAVAS from this case, and with the determination that the named plaintiffs' claims have become moot, the case as a whole has become moot as well. Plaintiffs contend that their renewed motion for class certification, which initially was denied by the Court as moot in its Memorandum Order granting defendants' motion for summary judgment, should serve to resuscitate this case, despite the fact that the named plaintiffs' cases are now moot. Plaintiffs are not correct. The Court

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[4] The Court of Appeals did not reach the issue of LAVAS's standing in its opinion, because it considered that the named plaintiffs residing in the United States had standing to sue and therefore declined to reach the standing issue with respect to the other named plaintiffs. *LAVAS*, 45 F.3d at 472 (citing *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 810 (D.C. Cir. 1993) (per curiam)).

quite properly denied plaintiffs' motion for class certification as moot when it issued its Order granting defendants' motion for summary judgment. Because no class was certified by the Court, and because the named plaintiffs' claims have now become moot, no case or controversy exists on which to append a class of plaintiffs, or new individual plaintiffs, for that matter. *See Board of School Commissioners v. Jacobs*, 420 U.S. 129, 130, 95 S.Ct. 849, 850 (1975) (where case or controversy no longer exists as to named plaintiffs, case is moot unless it was certified as a class action, a controversy still exists between defendants and members of the class, and the issue in controversy is capable of repetition yet evading review).

This decision does not in any meaningful way constitute a setback for plaintiffs. Currently pending before the Court is a motion for preliminary injunction and cross-motions for summary judgment in *Vo Van Chau v. Department of State, Bureau of Consular Affairs*, Civil Action No. 95-989 SSH. Plaintiffs in *Vo Van Chau* bring the same claims and allegations against the DoS as plaintiffs allege in this case, so plaintiffs are not relegated back to the beginning of the queue by virtue of this decision, since the Court must soon make a determination as to the motions currently pending in *Vo Van Chau*. Accordingly, it hereby is

DECREED, that this case is moot. The Clerk of the Court is directed to transmit a copy of this Memorandum Opinion to the Court of Appeals.

/s/ *Stanley S. Harris*
STANLEY S. HARRIS
United States District Judge

Date: SEP 11 1995

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5104

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS; THUA VAN LE; EM VAN VO; THU HOA THI DANG; TRUC HOA THI VO, APPELLANTS

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., APPELLEES

ON PETITION FOR REHEARING

[Filed: Feb. 2, 1996]*

Before: EDWARDS, *Chief Judge*, SENTELLE and RANDOLPH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* SENTELLE.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* RANDOLPH.

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* Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

SENTELLE, *Circuit Judge*: On this petition for rehearing and suggestion for rehearing *in banc*, the United States Department of State argues that the case has been mooted by its tender of the relief requested by the individual appellants. The District Court has ruled on remand in favor of the State Department on the mootness issue, but the appellants contest this ruling. Because we hold that the case is not moot as to two of the individual named appellants, we reverse the District Court's mootness determination, deny rehearing, and remand the case for treatment consistent with both this opinion and our prior opinion on the merits of the State Department's policies. *See Legal Assistance for Vietnamese Asylum Seekers v. Department of State, Bureau of Consular Affairs* (hereinafter "*LAVAS*"), 45 F.3d 469 (D.C. Cir. 1995).

I. FACTUAL BACKGROUND

This case arises out of disagreements over the procedures used for handling the tremendous flow of immigrants out of Vietnam that has continued ever since the North Vietnamese took over South Vietnam in 1975. From June 1979 through June 1988, Hong Kong (and other nations in the region) granted presumptive refugee status to Vietnamese immigrants on the condition that the United States and other western countries would help resettle them. But in 1988, following an increase in the number of economic immigrants, Hong Kong changed its policies, determining that it would detain all new arrivals and screen them for actual refugee status. The countries concerned soon formed the Comprehensive Plan of Action, which provides that those screened out as

non-refugees should return to Vietnam, where they can then apply for immigrant visas.

In April 1993, the United States Consulate in Hong Kong stopped processing immigrant visa applications on orders from the United States State Department. In February 1994, plaintiffs Legal Assistance for Vietnamese Asylum Seekers (LAVAS), Thua Van Le, Em Van Vo, Thu Hoa Thi Dang, and Truc Hoa Thi Vo filed suit against the State Department and various officials, claiming individually and on behalf of the class of screened-out Vietnamese told to return to Vietnam that the State Department's policy change violated the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1151-1156, the regulations promulgated thereunder, the Administrative Procedure Act, and the United States Constitution. The four individual plaintiffs comprise two pairs, each consisting of one Vietnamese refugee and that refugee's United States sponsor. The District Court granted summary judgment for the State Department in April 1994. (For a more detailed summary of the factual background up to this point, see our prior opinion in *LAVAS*, 45 F.3d at 470-71.)

On appeal by LAVAS, we held in February 1995 that the State Department's refusal to process appellants' applications at the United States Consulate in Hong Kong violated the INA. *See id.* at 470-74. Judge Randolph dissented on the merits, but also on the grounds that we should have remanded the case to the District Court to determine whether the dispute had become moot because the alien appellants might have already obtained relief at the time of the decision. *See id.* at 474-76 (Randolph, J., dissenting). In March 1995, the State Department filed a petition for rehearing and suggestion for rehearing *in banc*,

claiming for the first time in the litigation that the case was mooted as to Thua Van Le and Thu Hoa Thi Dang on July 21, 1994, when Dang was found eligible for an immigration visa, and as to Em Van Vo and Truc Hoa Thi Vo on November 30, 1994, when Truc Hoa Thi Vo was preliminarily determined to be ineligible for an immigrant visa. The appellants concede that the individual claims of Thua Van Le and Thu Hoa Thi Dang have become moot, but claim that these individuals and LAVAS may remain as class representatives. They do contest the mootness of the Vos' individual claims.

In May 1995, because resolution of the mootness issue might require the evaluation of new evidence, we remanded the case to the District Court for a determination. On September 11, 1995, the District Court declared the case moot and issued a memorandum opinion, relying primarily on its view that the only claim for relief was that Truc Hoa Thi Vo's application be processed in Hong Kong instead of in Vietnam:

> The application of detained plaintiff Truc Hoa Thi Vo was . . . processed at the United States Consulate in Hong Kong and was denied on November 30, 1994. Ms. Vo has one year from the date of denial of her immigrant visa application to supply the Consulate with additional documentation to support her application, or her application will be canceled.
>
> Plaintiffs contend that the current status of Ms. Vo's application is such that her case cannot be moot, since the Consulate has not yet made a "final" determination to grant or deny her immigrant visa application, but has made only an

> "initial" determination to deny her application. Defendants argue that Ms. Vo has obtained the relief she sought—namely, that her immigrant visa application be processed by the United States Consulate in Hong Kong, rather than after a forced repatriation to Vietnam. The Court agrees with defendants. Ms. Vo has obtained the specific relief she sought and has had her application processed by the United States Consulate in Hong Kong. Plaintiffs are correct that the Consulate has not yet finally determined whether Ms. Vo's immigrant visa application will be granted or denied, but the relief Ms. Vo sought from this Court—the processing of her application in Hong Kong instead of Vietnam—has been achieved. (The Court has, of course, no power to review a final determination of the Consulate as to the merits of Ms. Vo's immigrant visa application.) Ms. Vo's claims, and those of her citizen-sponsor, Em Van Vo, are therefore moot.

Mem. Op. at 3-4. We subsequently ordered additional briefing on the issue of mootness, which issue we now consider as a prelude to ruling on the request for rehearing.

II. LEGAL ANALYSIS

Mootness

We are guided in our decision in this case by our decision in *City of New York v. Baker*, 878 F.2d 507 (D.C. Cir. 1989). In *Baker*, the plaintiffs challenged the State Department's refusal to grant a visa to former Italian Senator Nino Pasti so that he could participate in a political demonstration in the United States. The State Department refused to grant the visa on the grounds that it would prejudice this country's foreign policy interests. On appeal, the State Department argued that the case had become moot because it had decided that it would not deny any future visa application from Senator Pasti or other aliens on the challenged basis. We rejected that argument, however, in light of the fact that accepting it would mean that "the State Department would be free to reassert its earlier position, which the government has not renounced." *Id.* at 511. Importantly, we noted that "voluntary cessation of a challenged practice does not in and of itself moot a case when the party could renew it." *Id.* at 511-12.

A useful case from a sister circuit court is *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988). In *Allende*, the State Department had initially refused to grant a visa to Hortensia de Allende. By the time of the appeal, however, the State Department had granted her a visa, and therefore claimed that the case was moot. The First Circuit rejected the mootness claim, stressing the continuing nature of the basic controversy:

> [T]he validity of [the challenged policy] in general remains a live controversy. . . . [T]he government has stated that future visa applications by Mrs. Allende "presumably would be approved." The government has not, however, revised its interpretation of [the relevant statute]. The mere voluntary cessation of its challenged activity does not, in our opinion, moot the controversy.

Id. at 1115 n. 7.

Both of these cases stand for the proposition that the government cannot escape the pitfalls of litigation by simply giving in to a plaintiff's individual claim without renouncing the challenged policy, at least where there is a reasonable chance of the dispute arising again between the government and the same plaintiff. *Better Government Ass'n v. Department of State*, 780 F.2d 86 (D.C. Cir. 1986), and *Payne Enterprises, Inc. v. United States*, 837 F.2d 486 (D.C. Cir. 1988). Appellants argue (with good reason) that theirs is just such a case. To begin with, appellants did not simply request a "one shot, all or nothing opportunity to have a consular officer interview Ms. Vo in Hong Kong." At a minimum, they requested that Ms. Vo's application be completely and fully processed in Hong Kong, not merely subjected to an initial determination. The record reveals that the State Department has not yet fully afforded this relief to Ms. Vo. Her application has been considered, but it remains open until November 16, 1996, according to an affidavit recently added to the record. Because Ms. Vo is still "participat[ing] in the application process giving rise to this action . . . [it] is not moot." *Singh v. Ilchert*, 784 F. Supp. 759, 762 (N.D. Cal. 1992).

In any case, even if Ms. Vo's current application had expired by this time, she would presumably be free to file another application. If she did, her dispute with the State Department would remain essentially unchanged since, according to both parties, the State Department has returned to its former policy of refusing to process applications of Ms. Vo's sort in Hong Kong after December 1, 1994. The State Department, then, cannot show that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987) (citation and internal quotation marks omitted). In fact, the allegedly wrongful behavior—the refusal to process applications of this type at the United States Consulate in Hong Kong—is virtually certain to recur, and it will quite probably recur in the case of Ms. Vo should her current application be turned down. Where there is a reasonable probability that "the same complaining part[ies]" will "be subject[] to the same action again," a finding of mootness is inappropriate. *Mississippi River Transmission Corp. v. F.E.R.C.*, 759 F.2d 945, 952 n.9 (D.C. Cir. 1985) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). We accordingly hold that this case is not moot as to the individual claims of Mr. and Ms. Vo and reverse the District Court's judgment of mootness. We deny the State Department's petition for rehearing.[1] Our prior judgment and opinion on the merits of the State Department's policy stands, and we remand this case to the District Court for treatment consistent with both this and our prior opinion.

[1] A suggestion for rehearing *in banc* still pends before the full court.

Class Certification

On this appeal, LAVAS and the individual appellants also challenge the District Court's failure to grant their class certification motion under FED. R. CIV. P. 23. The District Court initially denied this motion as moot in April 1994 after granting summary judgment for the State Department on the individual claims which we subsequently reversed. On remand, the District Court again refused to grant the certification, holding that "because the named plaintiffs' claims have now become moot, no case or controversy exists on which to append a class of plaintiffs." Mem. Op. at 8 (Sept. 11, 1995). Because we hold today that this case is not moot with respect to Mr. and Ms. Vo, the basis for the District Court's holding on the class certification motion is no longer true, and we must necessarily vacate the District Court's refusal to grant the class certification motion. However, we do not find it necessary to reach the merits of the motion. We simply remand this issue for reconsideration in light of our holding that the case is not moot as to Mr. and Ms. Vo.[2]

[2] Subject to the full court's resolution of the *in banc* suggestion.

RANDOLPH, *Circuit Judge*, concurring in part and dissenting in part: I agree the case is not moot. LAVAS sought an order directing U.S. officials to "conduct the final processing" of the plaintiffs' visa applications in Hong Kong. Whatever "final processing" means, it has not yet occurred with respect to Truc Hoa Thi Vo. Her application was initially denied on November 30, 1994, several months before we issued our decision in *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469 (D.C. Cir. 1995). However, the consulate general's letter to her indicated that more processing in Hong Kong could occur, and an uncontested declaration filed with this court states that her application will remain alive at least until November 16, 1996.

Nonetheless, I would grant the petition for rehearing for reasons I have already given. *LAVAS*, 45 F.3d at 474-75 (dissenting opinion). *LAVAS* remains a barrier to full implementation of the international plan to end the "boat people" crisis. Since the time of our decision, the refugee problem has continued to fester. According to press reports, growing uncertainty over the position of the United States has contributed to rioting in the refugee camps, which has in turn slowed the process of repatriation. Philip Shenon, *Riots by Vietnamese Erode Plan to Send Them Home*, N.Y. TIMES, June 9, 1995, at A3. Under the international plan, all of the Vietnamese now in the Hong Kong camp were to be back in Vietnam by the end of 1995. *The Final Vietnam Refugees*, WASH. POST, Dec. 28, 1995, at A22. That deadline has now passed, and still no end is in sight. *Still a Long Battle Ahead to Clear Boatpeople Camps, Say Experts*, Agence France Presse, Jan. 16,

1996, *available in* LEXIS. In the meantime, further doubts have been raised about the majority's interpretation of the Immigration and Nationality Act. In a related case, now pending in this court (*Lisa Le v. Department of State*, No. 95-5425), the State Department contends that § 202(a)(1), 8 U.S.C. § 1152(a)(1), on which *LAVAS* rested, should not have been invoked because it governs only the issuance of visas, a matter not involved in this case, which deals instead with where visa applications must be processed. Venue determinations are, the State Department says, entrusted entirely to the Secretary of State by § 222(a), 8 U.S.C. § 1202(a), and are not subject to § 202(a)(1). Whatever the validity of this new argument, I remain convinced that none of the plaintiffs in this case were discriminated against on the basis of their nationality in violation of § 202(a)(1), that the majority decision is in error, and that the case should be reheard forthwith so that the United States can promptly bring itself into compliance with the international agreement this country reached with fifty other nations.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5104

SEPTEMBER TERM, 1995 USDC CV 94-0361

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, ET AL., APPELLANTS

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., APPELLEES

[Filed: Feb. 12, 1996]

ORDER

BEFORE: EDWARDS, Chief Judge, WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, Circuit Judges

Appellees' Suggestion for Rehearing *In Banc*, the response, the reply and the supplemental briefs following remand have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular

active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *in banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judges Williams, Ginsburg, Henderson and Randolph would grant the suggestion.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5104

SEPTEMBER TERM, 1995

LEGAL ASSISTANCE FOR VIETNAMESE
ASYLUM SEEKERS, ET AL., APPELLANTS

v.

BUREAU OF CONSULAR AFFAIRS, ET AL.,
DEPARTMENT OF STATE, APPELLEES

[Filed: Feb. 21, 1996]

ORDER

BEFORE: EDWARDS, Chief Judge, SENTELLE and RANDOLPH, Circuit Judges

Upon consideration of appellees' Motion to Continue Stay of Mandate Pending Disposition of Suggestion for Rehearing *In Banc*, filed February 7, 1996, the response and reply, and of appellees' Motion to Stay Mandate to Permit the Government Time

Within Which to Seek a Writ of Certiorari From the Supreme Court, filed February 15, 1996, it is

ORDERED that the motion of February 15, 1996 is granted. The Clerk is directed to withhold issuance of the mandate through March 21, 1996. It is

FURTHER ORDERED that appellees' motion filed on February 7, 1996 is dismissed as moot.

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5104

SEPTEMBER TERM, 1995 (94CV00361)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS; ET AL., APPELLANTS

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL.

[Filed: Mar. 14, 1996]

ORDER

BEFORE: EDWARDS, Chief Judge, SENTELLE and RANDOLPH,* Circuit Judges.

Upon consideration of the emergency motion to vacate judgment or, in the alternative, to stay the mandate, pending disposition of the *in banc* proceeding in *Lisa Le*, it is

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* Judge Randolph would have ordered a response to the motion.

ORDERED that the motion be denied.

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Elizabeth V. Scott
Deputy Clerk/LD

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 95-989 SSH

LISA LE ET AL., PLAINTIFFS,

v.

UNITED STATES DEPARTMENT OF STATE,
BUREAU OF CONSULAR AFFAIRS, ET AL., DEFENDANTS

[Filed: Dec. 13, 1995]

ORDER

Before the Court for current resolution are plaintiffs' renewed motion for a preliminary injunction, defendants' response, and plaintiffs' reply. (The parties' briefing on the merits remains pending.) The Court is sensitive to the time that has passed since plaintiffs initially filed their motion for a preliminary injunction, although the Court notes that plaintiffs agreed to combine their initial preliminary injunction motion with briefing on the merits, and the parties' motions were not ripe until August 17, 1995.

This case is in an unusual procedural posture. The appeal from its predecessor case was decided in *LAVAS v. Department of State*, 45 F.3d 469 (D.C. Cir. 1995), which dealt with issues identical to those

present in this case. Subsequent to the issuance of the opinion just cited, *LAVAS* was remanded to this Court, which concluded that that case was moot. *See* Memorandum Opinion in Civil Action No. 94-361, Sept. 11, 1995. That mootness determination, along with defendants' petition for rehearing *en banc*, remains under consideration by the Court of Appeals in *LAVAS*. Accordingly, this Court has hoped that further guidance would issue from the Court of Appeals prior to its resolution of the parties' dispositive motions.[1]

In retrospect, this hope was unrealistic, given the complexity and importance of the issues now before the Court of Appeals.[2] In addition, although defen-

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[1] The Court also placed great weight on defendants' representations, made in reliance upon commitments by the Hong Kong Government, that plaintiffs would not be repatriated before plaintiffs' claims could be litigated. Defendants initially assured plaintiffs that they would not be repatriated before October 1, 1995, after which concession plaintiffs agreed to combine their preliminary injunction motion with briefing on the merits. Defendants subsequently extended their guarantee to December 31, 1995, and, most recently, to April 1, 1996. A preliminary injunction typically is designed to maintain the status quo until resolution of a case on its merits can be had; the defendants' unilateral offer to maintain the status quo, in the Court's view, obviated the need to proceed expeditiously with respect to plaintiffs' preliminary injunction motion. The Court expresses its appreciation to both the United States and Hong Kong Governments for their cooperation in avoiding having the Court face unduly onerous time constraints.

[2] Those issues have been dealt with well and thoroughly by both sides in this case and in *LAVAS*. They involve tens of thousands of Southeast Asian migrants, each of whom has his or her own unique factual characteristics and hence must be dealt with on an individual basis. The great majority of them have

dants have given plaintiffs assurances that plaintiffs will not be repatriated before April 1, 1996, the Court is reluctant to continue to reserve ruling on plaintiffs' preliminary injunction motion until the Court of Appeals reaches a final resolution of *LAVAS*. In the meantime, although defendants correctly note that no mandate has issued in *LAVAS*, the conclusion is inescapable that, at least at this time, it does represent controlling law. Accordingly, it hereby is

ORDERED, that plaintiffs' renewed motion for a preliminary injunction is granted. Defendants shall take steps to process plaintiffs' visa applications in accordance with their practice as it existed prior to December 1, 1994. It hereby further is

ORDERED, that defendants shall take all possible steps to ensure that plaintiffs are not repatriated prior to a decision on the merits of their action, or

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fled communism in Vietnam, and the Court is not without sympathy for their plight. Efforts to deal with them have involved agreements among more than 50 countries, and the principles at issue far transcend the small number of parties to this case.

Of course, as would be expected whenever any trial court ruling is reversed, the undersigned respectfully believes that the dissenting judge's position in *LAVAS* is the correct one. Basically, the *LAVAS* decision is predicated on the idea that the government's manner of dealing with massive numbers of migrants in Hong Kong constitutes illegal discrimination against Vietnamese. The ultimate decision now rests in the Court of Appeals, but the *LAVAS* opinion calls to mind the observation made by the late Justice Frankfurter: "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting).

prior to their processing, whichever first occurs. It hereby further is

ORDERED, that a copy of this Order shall be transmitted to the Clerk of the United States Court of Appeals for the District of Columbia Circuit for association with its Case No. 95-5401.[3]

SO ORDERED.

/s/ *Stanley S. Harris*
STANLEY S. HARRIS
United States District Judge

Date: DEC 13 1995

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[3] Given all of the circumstances, although the Court does not believe that the prerequisites for the extraordinary remedy of mandamus are present, the Court sees no point in having the Court of Appeals expend its resources in resolving the delicate mandamus question which is presented. The blessing, however, is a mixed one: *LAVAS* remains pending, and the issuance of this preliminary injunction is appealable.

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5425

SEPTEMBER TERM, 1995 95CV00989

LISA LE, ET AL.,

v.

DEPARTMENT OF STATE, BUREAU
OF CONSULAR AFFAIRS, ET AL., APPELLANTS

[Filed: Jan. 2, 1996]

ORDER

BEFORE: SILBERMAN, SENTELLE,* and RANDOLPH,
Circuit Judges

Upon consideration of the emergency motion for stay pending appeal and for an expedited appeal, it is

ORDERED, on the court's own motion, that the district court's order filed December 13, 1995 be stayed pending this court's disposition of the petition for rehearing in *Legal Assistance for Vietnamese*

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* Circuit Judge Sentelle dissents.

Asylum Seekers, et al. v. Department of State, Bureau of Consular Affairs, et al., No. 94-5104. This administrative stay should not be construed in any way as a ruling on the merits of the motion for stay pending appeal and for an expedited appeal. *See D.C. Circuit Handbook of Practice and Internal Procedures* 68 (1994).

Per Curiam

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5425

SEPTEMBER TERM, 1995 95CV00989

LISA LE, ET AL.,

v.

DEPARTMENT OF STATE, BUREAU
OF CONSULAR AFFAIRS, ET AL., APPELLANTS

[Filed: Feb. 20, 1996]

ORDER

BEFORE: WALD, WILLIAMS and ROGERS, Circuit Judges

Upon consideration of the emergency motion for stay pending appeal and for an expedited appeal, it is

ORDERED that the emergency motion be denied. In view of this court's decisions in *Legal Assistance for Vietnamese Asylum Seekers, et al. v. Department of State, et al.* (*LAVAS*), 45 F.3d 469 (D.C. Cir. 1995), 1996 WL 39531 (Feb. 2, 1996) (on petition for rehearing), *reh'g en banc denied* (Feb. 12, 1996), appellants have not demonstrated the requisite likeli-

hood of success on the merits to warrant issuance of a stay or expedition of the appeal. *See Washington Metropolitan Area Transit Authority Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *D.C. Circuit Handbook of Practice and Internal Procedures* 68-69 (1994). It is

FURTHER ORDERED, on the court's own motion, that appellants show cause within thirty (30) days of the date of this order why the district court's order filed December 13, 1995 (granting a preliminary injunction), should not be summarily affirmed in light of this court's decisions in *LAVAS*. The response to the order to show cause shall not exceed 20 pages. Failure to comply with this order will result in dismissal of the appeal for lack of prosecution. *See* D.C. Cir. Rule 38.

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Elizabeth V. Scott
Deputy Clerk/LD

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5425

SEPTEMBER TERM, 1995 95CV00989

LISA LE, ET AL.,

V.

DEPARTMENT OF STATE, BUREAU
OF CONSULAR AFFAIRS, ET AL., APPELLANTS

[Filed: Feb. 20, 1996]

ORDER

Upon consideration of the motion for clarification and to continue stay, and the opposition thereto, it is

ORDERED that the motion for clarification be dismissed as moot. *See Legal Assistance for Vietnamese Asylum Seekers, et al. v. Department of State, et al.*, No. 94-5104 (Feb. 2, 1996) (on petition for rehearing) and (Feb. 12, 1996) (on suggestion for rehearing en banc).

FOR THE COURT:
Mark J. Langer Clerk

By: /s/ Elizabeth V. Scott
Deputy Clerk/LD

APPENDIX O

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 95-989 SSH

LISA LE, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF STATE,
BUREAU OF CONSULAR AFFAIRS, ET AL., DEFENDANTS

[Filed: Mar. 2, 1996]

MEMORANDUM OPINION

Before the Court are the following motions: plaintiffs' motion to join additional plaintiffs and motion for a preliminary injunction, defendants' opposition thereto, and plaintiffs' reply; plaintiffs' motion for summary judgment; and defendants' motion to dismiss or, alternatively, cross-motion for summary judgment, plaintiffs' reply and opposition to defendants' cross-motion, defendants' reply, and plaintiffs' surreply.

The history of this case has previously been set forth in the opinion of June 29, 1995, issued by another judge of this court who had the case temporarily, and in the opinion issued by the United States Court of Appeals for the District of Columbia Circuit in *Legal*

Assistance for Vietnamese Asylum Seekers ("LAVAS") v. Department of State, 45 F.3d 469 (D.C. Cir. 1995), a separate case which nonetheless is identical to this action in all relevant respects. Plaintiffs filed suit and moved for a preliminary injunction on May 25, 1995, and plaintiffs' motion for a preliminary injunction was granted on June 29, 1995. *Vo v. Department of State*, 891 F. Supp. 650 (D.D.C. 1995). On July 11, 1995, plaintiffs filed an amended complaint, adding 18 additional plaintiffs, and moved for a second preliminary injunction. (Plaintiffs Vo Van Chau and Le Thi Thanh Xuan's claims were later rendered moot when the Department of State processed and granted Le's visa application on September 14, 1995.) Plaintiffs' second motion for a preliminary injunction was granted on December 13, 1995. *Le v. Department of State*, Civil Action No. 95-989 (D.D.C. Dec. 13, 1995).

Plaintiffs' Motion To Join Additional Parties

On December 22, 1995, plaintiffs moved, pursuant to Fed. R. Civ. P. 21, to join 32 more individuals as plaintiffs. Plaintiffs moved at the same time for a third preliminary injunction and for summary judgment as to those additional parties. As with the 18 current plaintiffs, the 32 individuals are really 16 pairs: 16 are petitioner-sponsors living in the United States[1] who petitioned the INS for immigrant visas for Vietnamese nationals currently detained in Hong Kong, and 16 are the sponsored Vietnamese nationals.

[1] Fourteen of the 16 stateside sponsors are United States citizens, one is a permanent resident of the United States, and one is a religious organization.

Plaintiffs' motion to join additional parties requires a brief (and, by necessity, oversimplified) explanation of the process by which eligible detained nationals and their sponsors secure the nationals' entry into the United States. Before a detained Vietnamese national may apply to the United States Consulate General in Hong Kong for an immigrant visa ("IV"), his or her sponsor in the United States must petition for an IV from the Immigration and Naturalization Service ("INS"), under one of several provisions (the relevant provisions in this case relate to spouses, children, and religious immigrant workers). *See* 8 U.S.C. §§ 1151-1156 (Supp. 1995). The sponsor's IV petition, if approved by the INS, must also be "current"—that is, the detained Vietnamese applicant would not have to wait for a visa number if his or her subsequent IV application to the United States Consulate General were granted. *See* Aff. of Wayne S. Leininger, Defs.' Opp. to Pls. Mot. for Prelim. Inj., June 15, 1995.

When an IV petition is approved by the INS, it is submitted to the National Visa Center ("NVC") for processing. The NVC may send the approved IV petition directly to a specified consular post (*i.e.*, the post in Hong Kong) after entering it in its database, or the NVC may store the petition until the Visa Services Directorate (the "VO") determines that the petition may be processed by a consular post. Defs.' Corrected Opp., Aff. of Brian McNamara, para. 1.

When a stateside sponsor's IV petition is approved by the INS and is current, the detained applicant has one more hurdle to surmount: he or she must apply for an IV to the United States Consulate General, submit certain supporting documents, and, when his or her documentation is complete, submit to an

interview at the Consulate. If the IV application is granted, the applicant is allowed entry into the United States. This case and *LAVAS* are concerned only with this final stage of the process—the detainee's application to the United States Consulate General for an IV, once the INS has approved the sponsor's IV petition and the petition is deemed current.[2] Accordingly, the Court will consider accepting as plaintiffs only those individuals and sponsors whose IV petitions are current and approved by the INS, and who await only processing and decision by the United States Consulate General on their IV applications.[3]

Defendants state in their opposition and their corrected opposition to plaintiffs' motion to join additional parties that 13 of the 16 sponsors' IV petitions are current and have been approved (and, therefore, that 13 of the 16 detained plaintiffs are eligible for an interview with the Consulate, if they are document-ready). Defs.' Opp. to Pls.' Mot. to Join Add'l Parties, Aff. of Martha Sardinas (Jan. 12, 1996) (Sardinas Aff. I), paras. 2-3; Defs.' Corrected Opp., Aff. of Martha Sardinas (Jan. 24, 1996) (Sardinas Aff. II),

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[2] Any suggestion that the Court reach further back, tamper with INS policy, and order a particular IV petition approved would be, "to say the least, [as] disquieting" as suggesting that the Court tamper with foreign policy and order applications processed in a certain location. *See LAVAS*, 45 F.3d at 475 (Randolph, J., dissenting).

[3] The Court expresses no opinion on the feasibility or desirability of certifying a class of plaintiffs, this issue having been remanded to the Court for consideration in *LAVAS*. *See LAVAS v. Department of State*, No. 94-5104 (D.C. Cir. Feb. 2, 1996) (reversing the Court's mootness determination and remanding for consideration of class certification issue).

paras. 3-6; Defs.' Opp., Aff. of Bernard J. Alter (Jan. 12, 1996), para. 2a; Defs.' Corrected Opp., Aff. of Bernard J. Alter (Jan. 24, 1996), para. 2a. Defendants submit that they lack documentation on three detainees; Cao Thi My Linh (sponsored by Jon Van Phan, a.k.a. Phan Thang Van), Nguyen Thi Thanh (sponsored by Nguyen Ngoc Huang) and Nguyen Van Ton (sponsored by Nguyen Van Dien).

Plaintiffs have submitted documentation showing that the IV petition of Jon Van Phan has been approved by the INS. Pls.' Reply, Ex. 1. Plaintiffs also have submitted documentation showing that Phan became a United States citizen on September 13, 1995. According to defendants' submissions, Phan's citizenship, and the INS's prior approval of his IV petition, renders the petition current. Sardinas Aff. II, para. 3. Phan's spouse, Cao Thi My Linh, is accordingly eligible (if document-ready) for an IV interview at the USCG in Hong Kong, upon submission of the approved petition to the USCG in Hong Kong by the NVC.[4]

Nguyen Ngoc Huang is also a United States citizen. Pls.' Mot. to Join Add'l Parties at 3, para. 11.

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[4] The Court recognizes that, in some circumstances, the NVC may not immediately forward an approved IV petition to the appropriate consular post for processing. *See* McNamara Aff., para. 1. Defendants should not interpret this Memorandum Opinion to mean that the NVC must hasten or abort its processing of approved IV petitions, but only that, once the NVC has determined that an approved IV petition for a Vietnamese national detained in Hong Kong should be forwarded, the approved petition should be sent to the USCG in Hong Kong, and not the Orderly Departure Program ("ODP") in Bangkok. *See* Sardinas Aff. I, paras. 1-2 (noting that screened-out immigrants' approval IV petitions are currently sent to the ODP in Bangkok).

The IV petition of Nguyen Ngoc Huang was approved by the INS on October 25, 1995. Pls.' Reply, Supp. Decl. of Mark Zuckerman, para. 4. His petition, too, is therefore approved and current, and his spouse, Nguyan Thi Thanh, is eligible (if document-ready) for an IV interview at the USCG in Hong Kong, upon submission of the approved petition to the USCG by the NVC. *See* Sardinas Aff. II, para. 3.

Remaining is detainee Nguyen Van Ton, sponsored by his father, Nguyen Van Dien, who is a United States citizen. Despite plaintiffs' explicit representation to the contrary, *see* Pls.' Reply at 2, Nguyan Van Dien's IV petition has not been approved by the INS; it has only been reviewed by the INS. Pls.' Reply, Ex. 3. According to that document, it takes "300 to 330 days" from the date of receipt of an IV petition for the INS to process the case. *Id.* The Court has not other indication that the INS has approved Nguyen Van Dien's IV petition on behalf of Nguyen Van Ton, and these two individuals therefore are not proper plaintiffs in this action. Accordingly, plaintiffs' motion to join additional plaintiffs is granted as to all but two: Nguyen Van Dien and Nguyen Van Ton.

Plaintiffs' Motion for Summary Judgment

On February 13, 1996, the Court of Appeals (by a vote of 7-4) denied defendants' suggestion of rehearing *en banc* in *LAVAS*, No. 95-5104 (D.C. Cir. Feb. 13, 1996). This case is, in all relevant respects, identical to *LAVAS*. *See LAVAS v. Department of State*, 45 F.3d 469 (D.C. Cir. 1995); *Vo v. Department of State*, 891 F. Supp. 650, 652 (D.D.C. 1995) (noting that this action is "closely related" to *LAVAS*). While defendants are correct that the doctrine of nonmutual

offensive collateral estoppel may not be asserted against the federal government, *see United States v. Mendoza*, 464 U.S. 154 (1984), the government cannot evade, just as this Court may not fail to follow, precedent from its own court of appeals in a case presenting the same facts and the same issues of law. *See Stormont-Vail Regional Medical Ctr. v. Bowen*, 645 F. Supp. 1182, 1192 (D.D.C. 1986). Accordingly, plaintiffs' motion for summary judgment is granted.[5]

An appropriate Order accompanies this Opinion.

/s/ STANLEY S. HARRIS
STANLEY S. HARRIS
United States District Judge

Date: MAR 1 1996

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[5] Findings of fact and conclusions of law are unnecessary in ruling on a summary judgment motion. Fed. R. Civ. P. 52(a); *see Anderson v. Liberty Lobby*, 106 S.Ct. 2505, 2511 (1986).

APPENDIX P

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 95-989 SSH

LISA LE, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF STATE,
BUREAU OF CONSULAR AFFAIRS, ET AL., DEFENDANTS

[Filed: Mar. 2, 1996]

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it hereby is

ORDERED, that plaintiffs' motion to join additional party plaintiffs is granted as to the following individuals: Bui Thi Lan, Cao Thi My Linh, Huynh Vinh Nhan, Le Thi Kim Xuyen, Le Thi Tham, Lieu Hue Tuong, Ngo Thi Ka, Nguyen Thi Bich Thuy, Nguyen Thi Quynh, Nguyen Thi Thanh, Nguyen Thi Van, Pham Thi Nhiem, Pham Van Ngoan, Tang Mau Phong, Vo Thi My Linh, Pham Ngoc Tuan, Jon Van Phan, Cheung On Su, Bui Ngoc Vung, Truong Dinh Phuong, Shirley Kiu Ho, Diep Quoc Binh, John Ha Pham, Truong Cong Thanh, Nguyen Ngoc Hoang, Tran Dinh Tien, Nguyen Phu Duc, the Vietnamese

Catholic Ministry, Lay Chong Nhi, and Nguyen Van Hai. The complaint is deemed amended to include those individuals as plaintiffs. It hereby further is

ORDERED, that plaintiffs' motion for summary judgment is granted. It hereby further is

ORDERED, that defendants are permanently enjoined from implementing their decision to decline processing of plaintiff detainees' immigrant visa applications at the United States Consulate in Hong Kong. It hereby further is

ORDERED, that defendants shall take all necessary and proper steps to process plaintiff detainees' immigrant visa applications in accordance with their practice as it existed prior to December 1, 1994.

SO ORDERED.

/s/ STANLEY S. HARRIS
STANLEY S. HARRIS
United States District Judge

Date: MAR 1 1996

APPENDIX Q

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5425

LISA LE ET AL., APPELLEES,

v.

BUREAU OF CONSULAR AFFAIRS, ET AL.,
U.S. DEPARTMENT OF STATE, APPELLANTS

[Filed: Mar. 11, 1996]

ORDER

BEFORE EDWARDS, Chief Judge, WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, Circuit Judges.

Appellants' Petition for Initial Hearing *in banc* has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service voted in favor of the petition. Accordingly, it is

ORDERED, by the court *in banc*, that this matter will be considered and decided by the court sitting *in banc*.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

By: /s/Robert H. Bonner

Robert A. Bonner
Deputy Clerk

(2)

No. 95-1521

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES DEPARTMENT OF STATE,
BUREAU OF CONSULAR AFFAIRS ET AL.,

Petitioners,

v.

LEGAL ASSISTANCE FOR VIETNAMESE
ASYLUM SEEKERS, INC. ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT B. JOBE
LAW OFFICES OF ROBERT JOBE
360 Pine Street
3rd Floor
San Francisco, CA 94104
(415) 956-5513

WILLIAM R. STEIN
Counsel of Record
DANIEL WOLF
M. KATHLEEN O'CONNOR
HUGHES HUBBARD & REED
1300 I Street, N.W.
Washington, D.C. 20005
(202) 408-3600

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether the Department of State violated 8 U.S.C. § 1152(a), which prohibits discrimination on the basis of nationality in the "issuance" of immigrant visas, by adopting a policy requiring Vietnamese nationals residing in Hong Kong to return to the Socialist Republic of Vietnam to have their visas processed and issued, while not imposing a comparable requirement on nationals of other countries.

2. Whether a Department of State policy that violates 8 U.S.C. § 1152(a) because it discriminates against persons in the issuance of an immigrant visa on account of their nationality is subject to judicial review.

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Respondents Legal Assistance for Vietnamese Asylum-Seekers, Em Van Vo and Truc Hoa Thi Vo, respectfully submit this brief in opposition to the petition of the Department of State, Bureau of Consular Affairs et al. ("the Department") for a writ of certiorari.

STATEMENT

Respondent Em Van Vo ("Mr. Vo") is a U.S. citizen and the father of respondent Truc Hoa Thi Vo ("Ms. Vo"). (J.A. 0198-99.)[1] On June 24, 1979, Mr. Vo was able to escape from Vietnam by boat. His entire family, however, remained behind. (J.A. 0199.) Eleven years later, in July 1990, Ms. Vo fled to Hong Kong, where she has been detained ever since with her husband and two young children. (J.A. 0199-200.)

In April 1993, the Immigration and Naturalization Service ("INS") approved the immigrant visa ("IV") petition that Mr. Vo had filed on his daughter's behalf so he could reunite with her in the United States. Later that month, Mr. Vo was informed that his daughter would be interviewed by the U.S. Consulate in Hong Kong and if found eligible for the visa, "action will be taken to arrange for [her] departure from Hong Kong." (J.A. 0200-01, 0207-08.) On December 15, 1993, however, the U.S. Consulate, pursuant to a decision the Department had made eight months

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1 References to "J.A.___" are to the page(s) at which the material may be found in the Joint Appendix filed with the court below. In its petition, the Department cites numerous materials from the record in Lisa Le v. United States Department of State, Bureau of Consular Affairs, No. 95-5425 (D.C. Cir.), which are not part of the record in this case. Respondents suggest that all such citations to the record in the Lisa Le case are inappropriate. Nonetheless, in the event this Court believes that the record in Lisa Le can properly be considered with respect to the petition in this case, respondents have referred to such materials in this opposition. References to "L.A.___" are to the page(s) at which the material may be found in the Department's Appendix to an unauthorized brief it filed in the Lisa Le case (which the Department inaccurately characterizes as a "joint" appendix).

earlier in April, informed Mr. Vo that the Department had reversed its policy and would not process his daughter's IV application unless and until she returned to the Socialist Republic of Vietnam ("Vietnam"). (J.A. 0201, 0210.)

On February 25, 1994, Mr. Vo and his daughter brought this action in response to the Department's April 1993 decision to cease issuing immigrant visas in Hong Kong to Vietnamese nationals who, like Ms. Vo, reside in detention centers in Hong Kong and who, like Ms. Vo, have been authorized to immigrate to the United States by the INS. Respondents seek declaratory and injunctive relief on behalf of these Vietnamese nationals, and on behalf of the U.S. citizens and permanent residents who sponsored their IV petitions, to vindicate their right to non-discriminatory treatment in the issuance of immigrant visas under a congressionally mandated family reunification program.

While the Department seeks to portray this case as one of judicial interference with the Department's visa processing policies, in reality, this case involves nothing more than a straightforward issue of statutory construction under Section 202(a)(1) of the Immigration and Nationality Act ("INA"), which provides that "[n]o person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's . . . nationality." 8 U.S.C. § 1152(a). The D.C. Circuit made the unremarkable finding that when a person is forced to leave his country of residence to have his visa processed and issued because of his race or nationality, that person has been discriminated against "in the issuance of an immigrant visa."

Although this conclusion is dictated by the plain language of Section 202(a)(1), the Department asks this Court to rewrite that statutory provision because it does not like certain potential policy consequences it alleges might flow from the D.C. Circuit's decision to enforce the statute as written. We show below why the D.C. Circuit's decision has no significant impact on the Department's visa processing function, and why the consequences envisioned by the Department are speculative and wildly overblown. Moreover, if the Department has concerns about the effects of the unambiguous statutory provisions, the appropriate forum in which to seek review of congressional policy choices is

the Congress and not this Court. Acknowledging this fact, and implicitly acknowledging the correctness of the decision below, the Department has asked the Congress to amend Section 202(a)(1) of the INA to allow the Department to discriminate in the ways it says it must be able to discriminate. This Court, for its part, should leave that policy choice to Congress and reject the Department's invitation to pass upon the desirability of its proposed amendment to Section 202(a)(1).

1. Detention and screening of the boat people.

Since April 1975 when North Vietnamese forces captured Saigon, large numbers of refugees have escaped political oppression and economic privation in Vietnam by taking a dangerous journey across the open sea in rickety boats to Southeast Asia and Hong Kong. (J.A. 0116-18; J.A. 0186-87.) For nine years, from June 1979 until June 1988, the treatment of these Vietnamese "boat people" in Hong Kong was guided by an informal arrangement under which Hong Kong and other nations in the region committed themselves to granting temporary refuge ("first asylum") to Vietnamese boat people in exchange for a commitment from the United States and other western countries to resettle them. As part of this agreement, the Hong Kong Government ("HKG") accorded the Vietnamese boat people presumptive refugee status. (J.A. 0117-18.)

This relatively benign treatment of the boat people changed dramatically in 1987-88, when a new wave of refugees fled Vietnam. The HKG responded to the increase in new arrivals by announcing that as of June 16, 1988, it was revoking the presumptive refugee status of Vietnamese boat people and that all new arrivals would be detained and screened by local immigration authorities to determine on a case by case basis whether they qualified for refugee status. (J.A. 0118-19.) One year later, in June 1989, the screening program was memorialized in an informal agreement of the participating states (including the United States) known as the Comprehensive Plan of Action ("CPA").

Beginning on June 16, 1988, therefore, the HKG has regarded newly arriving boat people as illegal aliens and has placed them in

large prison-like detention centers surrounded by high chain link fences topped with rolls of barbed concertina wire. (J.A. 0118-19, 0121-22.) As human rights organizations have conclusively documented, these squalid detention centers are characterized by intense overcrowding, complete lack of privacy, unremitting boredom, extreme noise and heat, and the constant threat of rape, robbery, extortion, and other forms of physical violence. (J.A. 0121-22, 0149-53, 0156-59, 0181-85.)

2. U.S. refugee and immigration policies toward the boat people prior to April 1993.

Since at least 1979, the United States has permitted Vietnamese boat people to enter the United States on either of two tracks: as refugees under the criteria for political refugees later codified in the Refugee Act of 1980 or as beneficiaries of immigrant visas under the criteria set forth in the INA, 8 U.S.C. §§ 1151-1156. (J.A. 0116-18; J.A. 0089-90.) This case relates only to the immigrant visa track.

The immigrant visa option is available to boat people who are sponsored to immigrate to the United States by close relatives who are citizens of or permanent resident aliens in the United States. In order to obtain an immigrant visa, eligible Vietnamese boat people and their U.S. sponsors must complete several steps. First, the sponsoring U.S. citizen or lawful permanent resident (known as the "petitioner") must file a petition (Form I-130) with the INS, which may either approve or deny the petition. 8 C.F.R. § 204.1(a). Second, if the INS approves the petition, the Vietnamese visa applicant -- the "beneficiary" of the petition -- must complete and submit to the State Department an application for an immigrant visa (Packet Three and Form OF-230). 22 C.F.R. § 42.63(a). Third, the beneficiary must provide various documents to a U.S. consulate and must appear at the consulate for final processing of the visa application, including an interview before a consular officer, who must determine whether to grant the visa. 22 C.F.R. § 42.62(a).

For nearly 14 years, from June 1979 until April 1993, the Department, in accordance with the INA, processed IV applications for Vietnamese boat people in Hong Kong at the

Consulate in that jurisdiction, whether or not their status was "illegal" (i.e., screened out or not yet screened) under HKG immigration procedures. (J.A. 0118; J.A. 0089-90.) Such processing in Hong Kong was consistent with the controlling regulations that were in effect at the time, which required that the State Department conduct an applicant's IV interview "in the consular district in which the alien resides" or in which he is "physically present."[2] 22 C.F.R. § 42.61 (1993). It is not disputed that detained boat people are "residents" of Hong Kong within the meaning of either the former or the recently amended regulations.[3]

The implementation of the screening and detention policy in Hong Kong in June 1988 and the adoption of the CPA in June 1989 did not alter the Department's practice. The Department continued to process IV applicants at the U.S. Consulate in Hong Kong, regardless of whether or not they had been "screened-in" as refugees by the HKG. (J.A. 0118, 0212-13.) Indeed, in a cable dated December 14, 1990, the Department explained that to require the beneficiaries of current IV petitions who had been screened-out or who had not been screened-in to return to Vietnam for visa processing "strikes the Department as procedural overkill and not at all necessary to preserve the integrity of the CPA." (J.A. 0102-05 (emphasis added).)

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2 Under the INA, a person's "residence" is defined as "the place of general abode," which, in turn, is defined as a person's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). See also note 5 infra.

3 In response to this litigation, the Department amended its regulations on September 6, 1994 to give the Department discretion to deny immigrant visa beneficiaries the right to have their visa applications processed in the place in which they reside or are physically present. 59 Fed. Reg. 39,555 (1994). See 22 C.F.R. § 42.61(a) (1996).

3. U.S. refugee and immigration policies toward the boat people subsequent to April 1993.

In April 1993, the Department abruptly, and without notice to IV petitioners or beneficiaries, reversed its practice of processing IV applications for Vietnamese boat people at the U.S. Consulate in Hong Kong. (J.A. 0139-40; J.A. 0092-93.) Under the new practice, the Department refused to process the current IVs of any Vietnamese boat person who was illegally in Hong Kong, i.e., who had not been "screened-in" by the HKG as a political refugee. (J.A. 0125.) In a letter dated September 24, 1993, the U.S. Consulate described its new policy as follows:

> We have received clear instructions from the Department of State in Washington, D.C., that we are only authorized to process the immigrant visa cases of persons recognized [by HKG] as refugees. We may not process the immigrant visa request of anyone awaiting a screening decision. We also may not process the case of anyone screened-out as a refugee. This stipulation holds regardless of whether the person in question is a beneficiary of a current U.S. visa petition.

(J.A. 0130.)

In approximately December 1993, eight months after the change in policy, the U.S. Consulate started systematically notifying current IV beneficiaries that they would not be processed in Hong Kong. (J.A. 0195.) The standard letter stated as follows:

> The U.S. government supports the [CPA] . . . Under the CPA, those not recognized as refugees . . . must return to Vietnam to pursue resettlement in a third country. You have not been granted refugee status. Since you have been screened out, you must therefore return to Vietnam.

(J.A. 0131-35.)

The Department's requirement that current IV beneficiaries return to the country from which they fled in order to have their visa applications processed left those beneficiaries without any

viable option. An immigrant visa beneficiary who returns to Vietnam to have his or her application processed by a U.S. Consulate there will have that effort hampered by difficult, corrupt, costly and time consuming bureaucratic obstacles. (J.A. 0103, 0127-28, 0143-49.) Indeed, the district court in the Lisa Le case found that "substantial doubt" exists as to whether an applicant who returns to Vietnam will ever be able to "secure an exit visa" from the Hanoi regime. Vo Van Chau v. United States Dep't of State, 891 F. Supp. 650, 656 (D.D.C. 1995), appeal dismissed as moot, Order, No. 95-5205 (D.C. Cir. Oct. 19, 1995). (See also J.A. 0147, 0253, 0303-04, 0305-09.) Moreover, even if they could have their visas processed in Vietnam without encountering any but the normal obstacles, the full process takes at least one year to complete. (J.A. 0149; L.A. 343.) During this time, the returning applicants -- who will have cut all of their ties with Vietnam before they left and who may have no family to return to -- will endure emotional trauma, discrimination and severe economic hardship, even if they are not "refugees" within the meaning of the 1951 Convention Relating to the Status of Refugees. (J.A. 0126, 0143-49; L.A. 460-61; Third Supplemental Declaration of Mark L. Zuckerman, sworn to August 11, 1995 (in the record in Lisa Le and not included in the Department's "joint appendix") at ¶¶ 2-5.)

4. The initial proceedings in the district court.

On February 25, 1994, respondents Em Van Vo and Truc Hoa Thi Vo, together with LAVAS and two other named plaintiffs (Thua Van Le ("Mr. Le") and Thua Hoa Thi Dang ("Mrs. Dang")), on behalf of themselves and all other persons similarly situated, brought this action against the Department of State, challenging its April 1993 decision to cease IV processing. The complaint alleged that this decision was in violation of the INA and the regulations promulgated thereunder, the Administrative Procedure Act ("APA"), and the Constitution of the United States. (J.A. 0325-42.)

In order to prevent irreparable injury in the form of forcible repatriation, continued detention under deplorable conditions, and prolonged separation from family members, respondents filed,

together with their complaint, motions for a temporary restraining order and a preliminary injunction. On March 2, 1994, the district court refused to issue a TRO requiring the State Department to take action to prevent the repatriation to Vietnam of several members of the putative class who were due to be forcibly repatriated on March 8. (Pet. at 21a.)

On March 3, respondents appealed this order on the ground that it in effect constituted denial of a preliminary injunction, and filed a motion for emergency relief in the court of appeals. Finding that respondents would suffer irreparable injury if they were repatriated to Vietnam, the court of appeals issued an order on March 6 granting respondents' motion and directing the State Department "to take all necessary and proper action to ensure that [the putative class members] are not repatriated." (Pet. at 23a.) As a result of this order, the Department communicated with the HKG, which complied with the Department's request that the class members be removed from the March 8 forced repatriation flight. (J.A. 0022.)

Following a hearing that consolidated respondents' application for a preliminary injunction with the trial on the merits,[4] the district court issued a final order on April 28, 1994, granting the State Department's motion for summary judgment and denying respondents' cross motion for summary judgment. (Pet. at 28a.)

The district court rejected respondents' argument that the applicable regulations required the Department to process their visa applications in Hong Kong. Despite the plain language and the Department's own authoritative interpretation, the district court held that the regulation made the decision whether to process respondents' visa applications a "policy choice" that is "entitled to deference." (Pet. at 27a.) In a single sentence containing no

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4 No evidence was heard at the hearing, which consisted only of oral argument. Earlier, the district court had prohibited respondents from taking limited documentary discovery of the Department's cable traffic relevant to the decision to refuse IV processing, and from deposing pursuant to Fed. R. Civ. P. 30(a)(2)(C) a key witness while she was temporarily in the United States. (J.A. 0013.)

analysis, the district court also found "meritless" respondents' arguments that the Department's refusal to process was unlawful because it violated 8 U.S.C. § 1152(a) of the INA, the Constitution, the Department's own long-standing practice and the notice and comment requirements of the APA. (Id.)

5. The decision of the court of appeals.

On February 3, 1995, the D.C. Circuit issued its decision in this case, holding that the Department's April 1993 policy was discriminatory because it drew an explicit distinction between Vietnamese nationals and the nationals of other states: the Department had instructed the Consulate not to process the "immigrant visa petitions of Vietnamese nationals residing illegally in Hong Kong." (Pet. at 12a.) The court rejected the Department's suggestion that the line drawn was a "permissible line between legal and illegal immigrants," noting that "[t]he Department has never contended . . . that this change was made as to any other nationals than Vietnamese nationals, nor that illegally present nationals of other countries would be treated the same as illegally present Vietnamese nationals." (Pet. at 12a.)[5] The court of appeals held that such discrimination violated section 1152 of the INA, which "unambiguously direct[s] that no nationality-based discrimination shall occur." (Pet. at 11a.) Rejecting the Department's suggestion that it retains discretion under Section 1152(a) to discriminate on the basis of nationality so long as its policies are rationally related to U.S. foreign policy interests, the court stated:

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5 This is hardly surprising since the Department's Foreign Affairs Manual ("FAM") indicates that it is the Department's policy not to make such distinctions between legal and illegal status of aliens from other nations who apply for IVs in Hong Kong or elsewhere. See FAM § 42.61, N.1.2 ("the fact that an alien does/did not have, or intend to have, the status of a lawful permanent resident or any other legal status" in the country of his principal, actual dwelling "is not relevant").

> Congress could hardly have chosen more explicit language. While we need not decide in the case before us whether the State Department could never justify an exception under the provision, such a justification, if possible at all, must be most compelling -- perhaps a national emergency. We cannot rewrite a statutory provision which by its terms provides no exceptions or qualifications simply on a preferred "rational basis."

(Pet. at 9a.)

6. Subsequent proceedings.

After the court of appeals issued its decision, the Department claimed for the first time in a petition for rehearing that 8 U.S.C. § 1152(a) applies only to the decision of a consular officer whether to grant or deny an immigrant visa, and does not bar the Department from discriminating on account of race, nationality or the other enumerated bases in determining where visa applications will be processed ("consular venue"). The Department also argued for the first time that the case was moot because it had voluntarily processed or agreed to process the claims of the named plaintiffs and because a class action had not been certified.[6]

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6 The basis for the Department mootness argument was its eleventh hour decision made on February 25, 1994, the day respondents filed their complaint, to resume "normal" visa processing of the IV petitions of Vietnamese asylum seekers in Hong Kong. (J.A. 0044-45.) Following this decision, the Department interviewed Mrs. Dang and Ms. Vo at the U.S. Consulate in Hong Kong on July 21 and November 30, 1994, respectively. Mrs. Dang was determined to be eligible for an immigrant visa, thus mooting her claim and that of her husband Mr. Le. (Pet. at 42a.) Ms. Vo was determined to be preliminarily ineligible for a visa, but was informed that she had a right under the INA to resubmit her application. (Pet. at 42a-43a.) On December 1, 1994 the Department returned to its former policy of refusing to process IV applications of Vietnamese asylum-seekers who had not reported themselves "documentarily qualified" by that date. (Pet. at 46a.) The Department has asserted that this new policy

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On May 9, 1995, the court of appeals remanded the record to the district court for the purpose of deciding the issue of mootness. (Pet. at 30a.) On September 11, 1995, the district court held that the Department's voluntary conduct had mooted the case. (Pet. at 37a-38a.) On February 2, 1996, the court of appeals reversed, holding that the case was not moot as to respondents Em Van Vo and Truc Hoa Thi Vo, and denied the petition for rehearing. (Pet. at 40a.) On February 12, 1996, the full court denied the Department's suggestion for rehearing in banc. (Pet. at 51a.) On February 21, 1996, the court of appeals stayed issuance of the mandate for thirty days pending the filing of a petition for a writ of certiorari. (Pet. at 53a.) On March 21, the Department filed its petition in this Court.

REASONS FOR NOT HOLDING THE PETITION

As the Department points out, the issues that are the subject of its petition are currently again before the D.C. Circuit in Lisa Le v. United States Department of State, Bureau of Consular Affairs, Nos. 95-5425 and 96-5058 (D.C. Cir.), which is to be heard initially in banc and is scheduled for oral argument on September 19, 1996.[7] Because "the en banc court of appeals is currently considering the same issues," the Department asks this Court to "hold this petition until the court of appeals renders its decision." (Pet. at 27.) The Department gives one reason for requesting this hold: it wishes to prevent the mandate of the court of appeals from issuing in this case and, thereby, to prevent this case "from returning to the district court for inappropriate class certification

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> does not apply to Ms. Vo and that it is willing to process her application in Hong Kong.

7 The Department made the same ploy in the court of appeals, which denied its motion to extend the stay of the mandate in this case pending the disposition of the in banc proceedings in Lisa Le. (Pet. at 54a-55a.)

proceedings." (Id.) This Court should reject the Department's request to hold the petition.

1. Under Fed. R. App. P. 40(b), a stay of the mandate of the judgment of the court of appeals cannot exceed 30 days unless the period is extended for cause shown or the party who has obtained the stay files a petition for a writ of certiorari. The rationale for this rule is that "a petitioner who wishes to delay the enforcement of the order of the lower court may reasonably be expected to expedite the litigation by not taking the full time otherwise allowable by law." Robert L. Stern, Appellate Practice in the United States (2d ed. 1989).

In suggesting that this Court hold its petition for certiorari pending resolution of the in banc proceedings in Lisa Le, the Department asks this Court to assist it in its efforts to accomplish precisely what Fed. R. App. P. 40(b) was intended to prevent: delay in the enforcement of the order of a lower court. This is not an appropriate use of a petition for a writ of certiorari. The purpose of such a petition is to obtain review of federal questions of imperative public importance, not to gain tactical advantage over the other side by delaying the enforcement of the decisions of the courts below.

2. The Department's reason for asking this Court to hold the petition for certiorari makes no sense. If the petition is denied -- and we believe it should be -- the district court and the court of appeals are fully capable of determining what is "inappropriate" in this case in the light of the procedural posture of the Lisa Le case.[8] There is no justification for this Court to withhold decision on the petition as a means of controlling possible future procedural rulings by the courts below.

Moreover, deferral by this Court of its decision on the Department's petition cannot prevent possible class certification

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8 On April 18, 1996, the court of appeals in Lisa Le granted the Department's motion for a stay of the district court's order in that case pending disposition of the in banc proceedings. Order, Nos. 95-5425 and 96-5058 (D.C. Cir. Apr. 18, 1996).

which, despite the Department's suggestion, would hardly be "inappropriate." See pp. 14-16 infra. Any of the putative class members in this case is free at any time to file a separate action and immediately move for class certification therein. Accordingly, further stay of the mandate cannot achieve the result the Department desires.

3. On the other hand, were this Court inclined to grant the petition, fairness to the respondents and the putative class members dictates that it do so now, rather than waiting until the resolution of the in banc proceedings in Lisa Le. As we explain below, the Department has done everything in its power to deny respondents and the putative class members the ability to obtain timely relief both in this case and in the Lisa Le case. The Department now seeks to drag out these proceedings even further by inviting this Court to hold its petition pending the disposition of the in banc proceedings in Lisa Le.

If the Court were to wait until Lisa Le, the prospect of substantive review by this Court would be illusory. Oral argument is not scheduled to take place in the Lisa Le case until September 19, 1996. It seems unlikely that the court of appeals can rule in Lisa Le before December 1996 or January 1997 at the earliest. As the Court must be aware, however, on July 1, 1997 Hong Kong reverts to the rule of Communist China, which has "demanded that the camps there be empty when [it] takes control." "New Boat People Exodus: Back to Vietnam," N.Y. Times, Apr. 17, 1996, at A12.

If the D.C. Circuit in Lisa Le were to overrule the LAVAS decision, respondents and the putative class members would have insufficient time to obtain review by this Court before they are forcibly repatriated to Vietnam, and thus would be forever denied the relief they seek. On the other hand, were the D.C. Circuit in Lisa Le to uphold LAVAS, it would be too late for this Court to decide the case or even to schedule argument before July 1, 1997.[9]

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9 In the latter circumstance, either (1) the Department will obtain a stay of the mandate, in which case respondents as a practical matter will

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Such a result would be extremely unfair to respondents and the class they seek to represent. Respondents filed this action as a class action for the purpose of vindicating their right and the right of all persons similarly situated to timely non-discriminatory processing of their visa applications in Hong Kong. Respondent Em Van Vo sued so that he and the other American citizens and permanent residents he is trying to represent could promptly be reunited with their family members, rather than having to wait while those family members return to Vietnam where at a minimum they would have to wait one year or longer to have their visas processed, and where there is a risk they might never be given an exit visa. In the meantime, Mr. Vo's daughter, respondent Truc Hoa Thi Vo, and the detained Vietnamese nationals she is trying to represent, continue to languish in detention camps under horrible conditions, separated from their loved ones in the United States.

4. Deferring decision on the petition would reward the Department's inappropriate procedural maneuvering in the courts below. Respondents have been seeking class certification for more than two years since the day they filed this action on February 25, 1994. The district court, however, never ruled on respondents' class certification motion because, at the Department's insistence, it granted the Department's motion for summary judgment on April 28, 1994 without first resolving the issue of class certification as it was required to do under Fed. R. Civ. P. 23(c)(1) ("As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.").[10]

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be denied all relief, or (2) the Department will not obtain a stay and the case will likely become moot before review by this Court.

10 See, e.g., Swisher v. Brady, 438 U.S. 204, 214 n.11 (1978) (admonishing district courts "to heed strictly" the requirements of Fed. R. Civ. P. 23(c)(1) "where mootness problems are likely to arise"); Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325, 1334

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In seeking rehearing of the D.C. Circuit's February 3, 1995 decision, the Department then argued that the case had become moot, in part because no class had been certified. At the Department's request, the court of appeals remanded the record to the district court for consideration of the mootness issue. On remand, the respondents again sought class certification, and again the Department persuaded the district court not to rule on the issue. On appeal from the district court's ruling that this case was moot, respondents again asked the court of appeals to certify a class, but the Department argued that the court must remand for such a determination. On February 2, 1996 the court of appeals reversed the district court's mootness determination, finding that the Department's mootness argument was wholly lacking in merit. (Pet. at 39a-49a.)[11] Following the Department's suggestion, however, the court did not itself certify a class and remanded.

Accordingly, had the Department not persuaded the district court to ignore the class certification issue, and then throughout these proceedings resisted any effort to have a court decide the issue, the court of appeals would have finally disposed of this case in early 1995, and the Department would have filed its petition more than one year ago. Under those circumstances, the respondents and class members would not now have their backs against the wall of the July 1997 reversion to Chinese Communist rule while awaiting judicial resolution of their claims, and the Department would not face the tactical difficulties presented by parallel litigation (since there would have been no need for 24 members of the putative class in this case to file the Lisa Le case).

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(1st Cir. 1991) (characterizing failure to determine certification issue as soon as practicable after action commenced as "an egregious omission"); Larionoff v. United States, 533 F.2d 1167, 1183 (D.C. Cir. 1976), aff'd, 431 U.S. 864 (1977).

11 Implicitly acknowledging that its mootness argument had no merit, the Department does not seek review of that ruling. (Pet. at 10 n.7.)

Ironically, although the Department resisted any decision on class certification, it did not oppose class certification or state that certification was inappropriate.[12] Indeed, in Lisa Le, the Department scolded the putative class members in this case for starting a separate action, and for all intents and purposes conceded that class certification is appropriate in this case, stating that "[i]t is untenable to permit the putative class members [in LAVAS] one-by-one to seek injunctive relief in separate cases." (Dept's Emergency Motion for a Stay Pending Appeal, Chau, No. 95-5205 (D.C. Cir., June 29, 1995).) It seems that the Department does not really believe that class certification is unwarranted. Its litigation tactics, however, threaten to deny respondents (and the putative class members) any effective relief.

Thus, if this Court concludes that review in this case is warranted, it should grant the Department's petition without delay. On the other hand, if this Court concludes that review in this case is not warranted, there is no reason to hold the Department's petition pending the disposition of the in banc proceedings in the court of appeals.

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12 The reason that the Department did not oppose class certification is that it could not. This action is a "paradigm" Rule 23(b)(2) class action both because the relief sought is solely injunctive and declaratory in nature and because the claims at issue are predicated on a discriminatory agency policy that is generally applicable to all members of the plaintiff class. Comer v. Cisneros, 37 F.3d 775, 796-97 (2d Cir. 1994).

REASONS FOR DENYING THE WRIT

I. THE DEPARTMENT FAILED TO PRESERVE ITS CONSULAR VENUE ARGUMENT.

The principal basis upon which the Department seeks a writ of certiorari is that, in the Department's view, the court of appeals' "construction of Section 202(a)(1) of the INA is erroneous" because that section only "prohibits consular officers from granting or denying visas on the basis of nationality" and "does not . . . speak to the State Department's authority to control where aliens may apply for visas." (Pet. at 16 (emphasis in original).)

While the Department now believes that interpretation to be self-evident, the Department did not raise in the district court the issue whether Section 202(a)(1) applies to "consular venue" decisions. Nor did it raise the issue in its merits brief before the court of appeals or at oral argument. The first time the Department even mentioned this issue was in its petition for rehearing and suggestion for rehearing in banc. It is, however, a long standing principle in the courts of appeals that a party may not raise issues for the first time on petitions for rehearing or rehearing in banc.[13] The principle is no less true in this Court that a "question presented in [a] petition [for certiorari] but not raised in [the] court of appeals is not properly before" it. Delta Airlines, Inc. v. August, 450 U.S. 346, 362 (1981). Inasmuch as the critical legal argument upon which the Department seeks certiorari has not been raised or passed upon by the court of

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13 See, e.g., Dilley v. Alexander, 603 F.2d 914, 916 (D.C. Cir. 1979); Bullock v. Mumford, 509 F.2d 384, 388 (D.C. Cir. 1974); Peter v. Hess Oil Virgin Islands Corp., 910 F.2d 1179, 1181 (3d Cir. 1990) (citing numerous cases), cert. denied, 498 U.S. 1067 (1991); Anderson v. Beatrice Foods Co., 900 F.2d 388, 397 (1st Cir. 1990), cert. denied, 498 U.S. 891 (1990); cf. Herbert v. National Academy of Sciences, 974 F.2d 192, 196 (D.C. Cir. 1992) (court of appeals "generally refuses to entertain arguments raised for the first time in an appellant's reply brief").

appeals, it would not be appropriate for this Court to grant certiorari to consider that argument.

II. THERE WAS NO ERROR BY THE COURT BELOW.

A. The D.C. Circuit Correctly Applied Section 202(a)(1) Of The INA.

1. In addition to being late, the Department's argument that Section 202(a)(1) of the INA only "prohibits consular officers from granting or denying visas on the basis of nationality" is wrong. The Department's interpretation of 8 U.S.C. § 1152(a) contravenes the plain language of the statute and defies logic.[14] That section by its terms provides that "[n]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's . . . nationality." 8 U.S.C. § 1152(a) (emphasis added). The use of the word "priority" demonstrates that section 1152(a) is not limited to the substantive decision of the consular officer whether or not to grant a visa, but encompasses also the timing of such issuance -- a matter that is inextricably related to place of processing.

The Department also ignores the fact that 8 U.S.C. § 1152(a) places nationality on the same footing as race to prohibit discrimination with regard to either in the issuance of an immigrant visa. Under the Department's narrow interpretation, the Secretary -- or an individual consular officer for that matter -- could impose onerous procedural requirements on the issuance of

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14 The Department's interpretation of this provision -- asserted for the first time in its petition for rehearing -- is entitled to no deference. See, e.g., Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 156 (1991); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988); Bresgal v. Brock, 843 F.2d 1163, 1168 (9th Cir. 1987) (where agency construes statute for first time at "outset" of litigation, its "construction is entitled to no more deference than is the interpretation of any party to the suit"); Alaniz v. Office of Personnel Management, 728 F.2d 1460, 1465 (Fed. Cir. 1984) ("It is clear that no deference is due to an agency 'interpretation' fashioned for the purposes of litigation.").

an immigrant visa, which would make the procurement of such visas more difficult for members of a particular race or nationality. For instance, a consular officer could require all aliens of a particular race or nationality to meet special documentary requirements based on his or her belief that aliens of that race or nationality are more likely to fall within one of the specified grounds of exclusion (e.g., likely to become a public charge). Alternatively, the Secretary would be free simply to suspend indefinitely all processing of immigrant visas for a group of aliens purely on the basis of race or nationality, since that suspension would not involve individual consular officers' decisions whether to grant or deny a particular application. It is inconceivable that this was the intent of Congress when it enacted 8 U.S.C. § 1152(a).

By focusing on the word "issuance" in isolation, the Department also overlooks the fact that 8 U.S.C. § 1152(a) is an anti-discrimination provision that forbids discrimination in the issuance of a visa. It is well established that anti-discrimination provisions are "humanitarian" in nature and "should be liberally construed to effectuate the congressional purpose of ending discrimination." Rabzak v. Berks County, 815 F.2d 17,20 (3d Cir. 1987).[15] Yet, no broad reading of Section 1152(a) is needed to conclude that when a person is forced to leave his country of residence to have his visa processed because of his race or nationality, that person has been discriminated against in the "issuance of an immigrant visa." Thus, in the context of this anti-discrimination provision, the place of processing an immigrant visa must be regarded as part and parcel of its issuance.

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15 Section 1152(a) was passed as part of the Immigration and Nationality Act -- Amendments of 1965, Pub L. 89-236. A major purpose of the Act was to eliminate the national origins quota system, which had restricted the immigration of aliens of Asian ancestry, and to ensure that "henceforth there will be no differentiation in the treatment of the Asian under the Immigration and Nationality Act." S. Rep. No. 748, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S.C.C.A.N. 3328, 3333.

When Congress prohibited all discrimination in the issuance of an immigrant visa, it necessarily prohibited the Department from imposing onerous procedural obstacles on the issuance of an immigrant visa, which make the procurement of such visas more difficult for members of one particular race or nationality than for members of another race or nationality. Congress recognized the absence of any meaningful distinction between processing and issuance when it included Section 222(a) of the INA (8 U.S.C. § 1202(a)) -- relating to the place of processing -- under a chapter entitled "Issuance of Entry Documents" (emphasis added). See also H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952), reprinted in 1952 U.S.C.C.A.N. 1653, 1708 ("Sections 221, 222, and 223 provide for the issuance of entry documents . . . [including] both immigrant and nonimmigrant visas.").

Similarly, Section 221 (8 U.S.C. § 1201), entitled "Issuance of visas," confirms that the Act makes no such artificial distinction between "issuance" and "processing." Subsection 1201(g) provides that a visa shall not be "issued" to an alien if the "application fails to comply with the provision of this chapter [the INA], or the regulations promulgated thereunder." The Act thus recognizes that the "issuance" of visas cannot be separated from the procedures under which visa applications are processed.[16]

2. The Department argues (at 18) that this Court should grant review because the D.C. Circuit erred in finding that "the policy at issue here discriminates on the basis of nationality." The Department does not explain why this Court should depart from its normal practice and grant review solely to correct what the Department asserts is an erroneous factual finding. At any rate, the Department's argument that its policy does not discriminate on

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[16] The Department's citation to a statement in the federal register to support its view that Section 202(a)(1) does not limit the Department's discretion to discriminate on the basis of race or nationality in consular venue decisions is astonishing. The Department drafted the self-serving language it cites when it amended 22 C.F.R. § 42.61(a) in specific response to this lawsuit -- nearly thirty years after Congress enacted Section 202(a)(1).

the basis of nationality is clearly wrong. Unlike "[n]ationals of other countries not subject to the CPA," Vietnamese immigrants in Hong Kong must establish the legality of their status, i.e., that they are not screened-out, in order to be processed at the consular office. (Pet. at 8a-9a.) Thus, as the D.C. Circuit correctly found, the Department's policy draws an "an explicit distinction between Vietnamese nationals and nationals of other countries when refusing to process the visas of the screened out Vietnamese immigrants." (Pet. at 9a.) By drawing such an explicit distinction, the Department's policy unquestionably "discriminate[s] against Vietnamese on the basis of their nationality." (Pet. at 11a); see also Chau, 891 F. Supp. at 655 ("What the declarations appear to prove is that the Department of State maintains a policy that discriminates against asylum-seekers from not one, but two or three specific countries").

B. The D.C. Circuit Was Correct In Holding That Decisions Of The State Department That Violate The INA Are Subject To Judicial Review.

1. The Department's only other argument in support of its petition is that the D.C. Circuit erred in finding that its discriminatory policy was subject to judicial review. This argument warrants little comment. The Department rests its argument principally on the doctrine of consular non-reviewability. (Pet. at 21.) As the courts of appeals have previously made clear, the doctrine of consular nonreviewability "has no application" where, as here, the challenge does not concern "a decision by a consular officer on a particular visa application," but the interpretation and application of a regulation that "violates the pattern set forth in [the INA]." International Union of Bricklayers & Allied Craftsmen v. Meese, 761 F.2d 798, 801 (D.C. Cir. 1985); accord Mulligan v. Schultz, 848 F.2d 655, 657 (5th Cir. 1988). Inasmuch as this case does not involve a challenge to any decision of a consular officer "on a particular visa decision," all of the cases cited by the Department are inapposite and the Department's fear that this case will open up "a broad new avenue of judicial review" is unfounded.

2. The Department's assertion that the respondents do not have a right under the APA to review agency action in violation of the INA is contrary to established judicial precedent. Under 5 U.S.C. § 702 of the APA, a party is entitled to seek review unless a statute specifically "preclude[s] judicial review." Abourezk v. Reagan, 785 F.2d 1043, 1051 (D.C. Cir. 1986), aff'd, 484 U.S. 1 (1987) (quoting 5 U.S.C. § 701). As the D.C. Circuit noted in Abourezk, 785 F.2d at 1051, the INA "far from precluding review, affirmatively provides for it" in 8 U.S.C. § 1328, which provides that "the district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under the provisions of this title."[17] The ruling in Abourezk is consistent with the pronouncement of this Court "that in the absence of clear and convincing evidence that Congress" intended otherwise, "the broadly remedial provisions of the [APA]" are available "to review administrative decisions under the 1952 [Immigration and Nationality] Act." Rusk v. Cort, 369 U.S. 367, 379-80 (1962); accord Jean v. Nelson, 472 U.S. 846 (1985) (holding that INS officials are "bound by the provisions of the [INA] and of the regulations" and remanding to district court to determine whether those officials exercised their "broad discretion" to deny parole under the INA and the regulations "without regard to race or national origin"); Brownell v. Tom We Shung, 352 U.S. 180 (1956); Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).[18]

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17 The Department's citation to Ardestani v. INS, 502 U.S. 129 (1991), is inapposite because that case involves review of deportation proceedings. Section 242(b) of the INA expressly provides that the deportation procedures it "prescribe[s] shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

18 "Pedreiro remains the law, although the particular mode of APA review at issue in the case -- an action for injunctive relief in federal district court -- has been eliminated by § 106 of the [INA], 'which replaced it with direct review in the courts of appeal based on the administrative record.'" INS v. Doherty, 502 U.S. 314, 330 (1992) (Scalia, J., concurring in the judgment and dissenting in part) (quoting Agosto v. INS, 436 U.S. 748, 752-53 (1978)).

Without citing any authority, the Department argues (at 22) that its discriminatory policy of refusing to process immigrant visa applications of Vietnamese nationals is "committed to agency discretion by law" within the meaning of 5 U.S.C. § 701(a)(2). Contrary to the Department's assertion, its decision to discriminate against Vietnamese asylum-seekers on the basis of their nationality, far from being committed to agency discretion, is expressly prohibited by 8 U.S.C. § 1152(a), and is expressly subject to judicial review by 8 U.S.C. § 1328.

III. THE DECISION OF THE COURT BELOW IMPLICATES NO INTERESTS OF SIGNIFICANT NATIONAL IMPORT.

A. The D.C. Circuit's Decision Presents No Threat To The CPA.

1. The Department attempts to elevate the importance of this case by emphasizing the "express commitment of the United States and other nations to the repatriation of Vietnamese migrants found not to be genuine refugees" and the importance of that commitment to the CPA. (Pet. at 23.) While it is true that such a commitment was made in the CPA in 1989 and was recently reaffirmed by the CPA steering committee, the fact is that the processing of immigrant visa applications of Vietnamese asylum-seekers in Hong Kong has never been regarded as being inconsistent with that commitment.

For at least four years after the CPA was adopted in June 1989,[19] the Department continued its practice, begun in 1979, of routinely processing the IV applications of Vietnamese asylum-seekers who had not been screened-in. In April 1993, the Department abruptly decided to stop such processing (891 F. Supp. at 652; J.A. 0118, 0124-25), but resumed processing in

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19 The CPA has no formal legal status, having never been submitted to the U.S. Senate for confirmation nor made the subject of an Executive order. (J.A. 0119.)

Hong Kong in February 1994, whereupon it processed at least 130 applications of screened-out Vietnamese until June 1995. (L.A. 198.) This voluntary processing did not "derail" the CPA or undermine the foreign policy of the United States.

As the Department recognized before this lawsuit began, such visa processing does not violate the CPA, because the CPA was never intended to address this subject. (J.A. 0122-23.) In a December 1990 cable to the Consulate in Hong Kong, for example, the Department explained that requiring a screened-out IV beneficiary to return to Vietnam to pursue resettlement is:

> not at all necessary to preserve the integrity of the CPA . . . Post maintains . . . that processing subject's IV case in Hong Kong would contravene the CPA because subject has been determined to be a non-refugee. That would of course be true if we were proposing to resettle her as a refugee. However, she would be coming as an immigrant and, as Post reports . . ., all major resettlement countries have made similar requests to release detainees for immigration.

(J.A. 0103-04 (emphasis added).)

The Department states (at 24) that some of our CPA partners, including Hong Kong and Great Britain, have expressed concern "that the voluntary repatriation of Vietnamese nationals not be impeded." It is not clear that this "concern" even relates to the resumption of IV processing by the U.S. consulate in Hong Kong. Even assuming it does, however, the expression of such concern is perplexing, to say the least, in view of the fact that many of our CPA partners, including Australia, New Zealand and Great Britain, are currently processing in Hong Kong the IV applications of screened-out Vietnamese asylum seekers, in accordance with their respective laws. (L.A. 154-55, 371.) Indeed, the HKG itself has granted almost 400 immigrant visas to detained Vietnamese boat people between January 1994 through March 1996, alone. (Declaration of Kathleen Fitzgerald, sworn to April 18, 1996 (attached to respondents' opposition to Department's motion to this Court for a stay pending appeal in Lisa Le) at ¶ 2 and Ex. A.)

Moreover, in accordance with Section 13(D)(2) of its own Immigration Ordinance, the HKG has always cooperated in the efforts of resettlement countries, including the United States, to process IV cases. (J.A. 0055, 0059-61, 0139.) In fact, until the court of appeals issued a stay in Lisa Le last week, the HKG was facilitating the processing of the putative class members' visa applications by assisting them in obtaining police certificates and releasing them for purposes of obtaining medical clearances and attending consular interviews. (Supplemental Declaration of Mark L. Zuckerman, sworn to March 18, 1996 (in the record below in Lisa Le) at ¶¶ 3-6.) In view of the fact that Hong Kong, Australia, Great Britain and other resettlement countries are processing in Hong Kong the immigrant visa applications of screened-out Vietnamese boat people, in accordance with their laws, the argument that it would "jeopardize" the CPA were the United States to resume such processing in accordance with its laws makes no sense.

2. With no shortage of hyperbole, the Department argues (at 23) that processing respondents' visa applications "threatens to derail the operation" of the CPA, because it will impede voluntary repatriation. The Department presents this issue as if the Hong Kong detention centers are teeming with U.S. immigrant visa beneficiaries. In fact, of the 20,000 Vietnamese boat people remaining in Hong Kong, only about 100, or one half of one percent, are the beneficiaries of current and non-current immigrant visa petitions. (L.A. 154.)[20]

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20 In the Lisa Le case, the Department asserted that processing of IV applications in Hong Kong encourages screened-out asylum seekers to marry U.S. citizens and to file employment-based petitions. At a time before it was preparing self-serving litigation affidavits, however, the Department dismissed this concern, stating in a cable to the U.S. Consulate that "Department doubts that American citizens in significant numbers would come to Hong Kong to marry boat people and then file immigrant visa petitions for them." (J.A. 0104.) This evaluation has proven correct as there has been no discernible "correlation between the changes in U.S. policy and the number of marriages between U.S. citizens and Vietnamese asylum-seekers."

[Footnote Continued On Next Page]

The Department's argument that the decision below is likely to have "serious adverse consequences for the successful operation of the CPA" hinges on its concern (at 23-24) that these 100 visa beneficiaries (some of whom will not become current until after July 1, 1997, when Hong Kong reverts to the control of Communist China) will be "unlikely to cooperate with the voluntary repatriation program" if the U.S. Consulate is required to accept their visa applications in Hong Kong. It is, of course, irrelevant whether applicants who are granted U.S. immigrant visas "cooperate with the voluntary repatriation program" because they will be leaving Hong Kong anyway. Those who are denied visas (or whose visas do not become current before July 1, 1997) will have no less incentive than anyone else to go back to Vietnam.[21]

Nor is there any truth to the argument that IV processing in Hong Kong will reduce the rate of voluntary repatriation among the camp population as a whole. The evidence clearly establishes that there is no statistical correlation between the decision to process or not to process IV applications in Hong Kong and the rate of voluntary return. (J.A. 0141; L.A. 154-55, 370-74; Supplemental Declaration of Mark L. Zuckerman, sworn to July 3, 1995 (in the record below in Lisa Le and not included in the Department's joint appendix) at ¶ 13.) Indeed, prior to April 1993, Hong Kong had "by far the highest rate of voluntary return

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[Footnote Continued From Previous Page]

(Third Supplemental Declaration of Mark L. Zuckerman, sworn to August 11, 1995 (in the record below in Lisa Le but not included in the Department's joint appendix) at ¶ 6.)

21 While the Department states (at 24) that those applicants denied visas can reapply, that is only correct if the refusal is not final and can be overcome by the presentation of additional evidence. 22 C.F.R. § 42.81(b). While the decision below may give the handful of people who fall into this situation an additional incentive to stay in Hong Kong, the Department cannot demonstrate that they would otherwise voluntarily repatriate or that their decision to remain in Hong Kong would have any appreciable impact on the CPA.

of Vietnamese asylum seekers in the region," even though at that time Hong Kong was the only place in which the U.S. Consulate was processing their IV applications. (J.A. 0141.)

This should not be surprising. The United States has been accepting IV beneficiaries from Hong Kong for many years. It defies common sense to suggest that the 99.5 percent of the camp population, who by now are fully aware that they do not meet U.S. immigration criteria, are influenced in their decision to remain in squalid detention centers by the 0.5 percent who do meet such criteria. (J.A. 0141-42; L.A. 344-45.) As reflected in the record, interviews with countless asylum-seekers, camp workers and UNHCR officials confirm that the asylum seekers' repatriation decision is driven by much more significant factors, such as the conditions of confinement, the perception of conditions in Vietnam, the existence (or absence) of financial inducements, and other events that may give rise to the expectation of a strategic change in resettlement policy. (J.A. 0141-42, 0213-14; L.A. 344, 371-73.)

One such event, which according to the Department's own affidavits in the Lisa Le case stopped repatriation dead in its tracks, was the introduction of a bill in Congress (L.A. 144) in May 1995 that could have resulted in the resettlement of as many as 20,000 Vietnamese boat people in the United States. (L.A. 199, 218.) In view of this legislation, the district court in an earlier opinion in the Lisa Le case found that the Department had not demonstrated that a court order granting preliminary injunctive relief would have any significant impact on voluntary repatriation. 891 F. Supp. at 657.

B. The D.C. Circuit's Decision Poses No Threat To The Integrity Of The Visa Processing Function.

The Department asserts (at 25) that the decision below "casts doubt on the authority of the State Department to establish policies that require special procedures for visa applications by nationals of certain countries." The Department, however, is only able to identify one area in which the Department alleges that it has been necessary to discriminate on the basis of nationality in the visa issuance process. In particular, the Department asserts its rule

directing visa applicants who reside or are otherwise present in countries where there is no consular office to a consular office in another country is placed in jeopardy by the decision below. (Pet. at 17-18, 25.) However, this rule, which is set forth in the Department's Foreign Affairs Manual, applies to all visa applicants in such countries regardless of their nationality. FAM § 42.61, N3.2-1 - N3.2-5. Accordingly, it is in no way affected by the decision below.

The Department also asserts (at 17, 25) that "special processing" may be required for IV beneficiaries who are nationals of countries identified with terrorism. The Department does not explain what these "special security procedures" consist of or why they are placed in jeopardy by the D.C. Circuit's ruling. Indeed, the Department does not even assert that these procedures discriminate on the basis of nationality. At any rate, even if these procedures draw distinctions based on nationality, they would not be infirm under the decision below to the extent they could be justified by a compelling national interest.[22]

The Department argues (at 24) that the decision below "throws into doubt" the ability of the United States to respond to "future migration crises." The Department fails to point to a single such crisis in which its ability to respond hinged upon the need to discriminate on the basis of nationality in the visa issuance process. Moreover, the Department's claim is incredible on its face in view of the fact that the number of U.S. immigrant visa beneficiaries will inevitably be just a tiny fraction of any mass migration crisis.

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22 The Department argues (at 17) that the existence of these "special security procedures" at the time Section 202(a)(1) was enacted demonstrates that the section was not intended to limit the Department's ability to discriminate on the basis of race or nationality in the processing of immigrant visas. Even if these special procedures discriminated on the basis of nationality and could not survive the decision below, which the Department does not demonstrate, the Department's practice prior to the adoption of Section 202(a)(1) does not provide any basis for departing from the plain meaning of that section. Nor does the existence of a discriminatory security procedure predating a legislative provision that expressly prohibits nationality discrimination suggest what Congress might have intended when it enacted that provision.

At bottom, the Department asks this Court to grant its petition because it believes that as a matter of policy it should have the discretion to discriminate on the basis of nationality that Congress denied the Department when it enacted Section 202(a)(1). This Court, however, is not the appropriate forum in which to seek review of congressional policy choices. If the Department believes that Section 202(a)(1) constitutes an unwarranted intrusion on its discretion, the Department should seek relief from the Congress. Indeed, that is precisely what the Department is doing. As part of the immigration bill which is currently before the Senate, the Department has slipped in a provision, which states that nothing in Section 202(a)(1)

> shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed.

S. 1664, 104th Cong., 1st Sess. § 172 (1996). To the extent it may be desirable as a matter of policy to amend Section 202(a)(1) in the manner the Department has proposed -- and we believe that it is not -- it is the Congress, and not this Court, that should pass upon the desirability of that amendment.

CONCLUSION

The petition for certiorari should be decided in the ordinary course and should be denied.

Respectfully submitted,

Robert B. Jobe
LAW OFFICES OF ROBERT JOBE
360 Pine Street
3rd Floor
San Francisco, CA 94104
(415) 956-5513

William R. Stein
(Counsel of Record)
Daniel Wolf
M. Kathleen O'Connor
HUGHES HUBBARD & REED
1300 I Street, N.W.
Washington, D.C. 20005
(202) 408-3600

Counsel for Respondents

April 22,1996

No. 95-1521

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF STATE,
BUREAU OF CONSULAR AFFAIRS, ET AL., PETITIONERS

v.

LEGAL ASSISTANCE FOR VIETNAMESE
ASYLUM SEEKERS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1521

UNITED STATES DEPARTMENT OF STATE,
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1. Respondents argue (Br. in Opp. 11-16) that this Court should not hold the petition in this case for the decision of the en banc court of appeals in *Lisa Le* v. *United States Department of State, Bureau of Consular Affairs*, No. 95-5425 (D.C. Cir.) (to be argued Sept. 19, 1996). In *Lisa Le*, the full court of appeals ordered initial hearing en banc to consider the issues presented in this case, and yet in this case, a panel of the same court refused to vacate its judgment or to stay its mandate pending the decision of the en banc court in *Lisa Le*.

We filed our certiorari petition and asked the Court to hold the petition for two reasons. *First*, the panel's decision is wrong as a matter of law on several important

issues. Since the panel denied rehearing and refused to vacate its judgment, it was necessary to file a petition for a writ of certiorari to preserve our opportunity for review by this Court in this case. If the en banc court in *Lisa Le* disagrees with our positions on reviewability and the merits, we would expect to file a petition for a writ of certiorari in *Lisa Le*, and to ask this Court to consider this case and that one together. But had we not petitioned for certiorari in this case, and had this case returned to the district court, the district court might well have felt constrained to take action based on an erroneous decision that is even now under review by the en banc court of appeals in *Lisa Le*—including entering an injunction requiring the State Department to process in Hong Kong a new visa application by respondent Truc Hoa Thi Vo. Such an order could render this case moot, if the visa were then granted and Ms. Vo traveled to the United States.[1]

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[1] Ms. Vo's application was considered in Hong Kong under the Department's 1994 interim policy of resuming the processing of such applications in Hong Kong, and she currently is eligible for reconsideration of her application in Hong Kong. See Pet. 6; Gov't C.A. Rehearing Pet. 3, 13-14. On November 30, 1994, Ms. Vo was informed by consular officials in Hong Kong that she would not be granted an immigrant visa at that time, but that she had a year in which to present additional information to support her application. See *id.* at 14; Gov't C.A. Supplemental Br. on Mootness 13. On November 16, 1995, she presented additional (but still insufficient) information in support of her application, and she was informed by a consular official in Hong Kong that her application was extended for an additional year, until November 16, 1996. See Pet. App. 45a.

The court of appeals held, however, that this case was not moot because, even after Ms. Vo's application *expired*, she would be free to file another application, which would be governed by the State Department's *current* policy against processing applications in Hong Kong. See Pet. App. 46a. "In fact," the court stated, "the allegedly wrongful behavior—the refusal to process applications of this type at the United States Consulate General in Hong Kong—is virtually certain to recur, and will quite probably recur in the case of Ms. Vo should her current application be turned down." *Ibid.* Thus, if this case were to be returned to the district court, Ms. Vo's current application were finally rejected, and she were to file a new visa application, that new application would be governed by the current policy, which, the court of appeals held in this case, is unlawful.

Second, the remand ordered by the panel in this case for consideration of class certification (Pet. App. 47a) could seriously interfere with the en banc proceedings in the *Lisa Le* case as well. If this case returned to the district court, that court might well regard itself as bound by the ruling of the court of appeals panel, as the law of the case. If the district court then certified a class (as respondents undoubtedly would request), that law of the case might apply to the entire class of screened-out Vietnamese migrants in Hong Kong, including any plaintiffs in *Lisa Le* who were members of the certified class. At a minimum, further proceedings in the district court would likely lead to further appeals and requests for stays, simply to prevent this case from requiring a change in the Department's policy while the *Lisa Le* case is pending.

2. Respondents argue (Br. in Opp. 17-18) that the government failed to preserve the argument that the anti-discrimination provision in Section 202(a)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. 1152(a)(1), does not apply to consular venue, and that consular venue is governed by INA Section 222(a), 8 U.S.C. 1202(a). That argument fails to acknowledge that respondents' principal argument below was that the Department was violating its consular venue regulation, 22 C.F.R. 42.61(a) (1994), which was promulgated pursuant to Section 222(a).[2] Although we

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[2] The principal issue addressed in both parties' initial appellate briefs was whether the Department's policy of not accepting immigrant visa applications from screened-out migrants in Hong Kong violated

did not emphasize, in our initial court of appeals brief in this case, the point that consular venue is governed by Section 222(a) rather than Section 202(a)(1), we did point out that the consular venue regulation on which respondents relied was promulgated pursuant to the "very specific authority" of Section 222(a) (see Gov't C.A. Br. 27), and we argued that, under that regulation, the State Department has discretion to determine the appropriate venue for immigrant visa applications, which might be affected by "[w]orld events, foreign policy objectives and/or budgetary constraints." *Id.* at 26-27.

We further argued below that the Department's policy regarding processing of immigrant visa applications filed by screened-out Vietnamese migrants in Hong Kong does not violate Section 202(a)(1). See Gov't C.A. Br. 36-38. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are

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the Department's consular venue regulation, 22 C.F.R. 42.61(a) (1994). See Resp. C.A. Br. 20-29; Gov't C.A. Br. 26-34. That issue had also been the principal focus of the district court's decision. See Pet. App. 26a-28a. When this case was filed, that regulation provided that, "[u]nder ordinary circumstances, an alien seeking an immigrant visa shall have the case processed in the consular district in which the alien resides." 22 C.F.R. 42.61(a) (1994). During the pendency of the appeal, the State Department amended the regulation to provide that, "*[u]nless otherwise directed by the Department*, an alien applying for an immigrant visa shall make application at the consular office having jurisdiction over the alien's place of residence." See 22 C.F.R. 42.61(a) (emphasis added). The court of appeals concluded that the amendment mooted respondents' challenge based on the prior version of the regulation, because the State Department had exercised its authority under the regulation to "direct otherwise" when it directed that screened-out Vietnamese migrants must apply for immigrant visas in Vietnam. See Pet. App. 7a-8a. The court of appeals did not address the significance of the government's representation that the regulation was based on Section 222(a).

not limited to the precise arguments they made below." *Lebron* v. *National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995); *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899). The same rule, we submit, is true of arguments made in opposition to a federal claim. See *Illinois* v. *Gates*, 462 U.S. 213, 248 (1983) (White, J., concurring in the judgment). In this case, respondents presented the claim that the Department's policy violates Section 202(a)(1), and the Department unquestionably opposed that claim. Moreover, when the court of appeals issued its decision relying squarely on its erroneous interpretation of Section 202(a)(1) but overlooking Section 222(a) completely, we explained the role of Section 222(a) at length in our petition for rehearing.

3. Respondents argue (Br. in Opp. 18-21) that the anti-discrimination rule of Section 202(a) governs the location at which visa applications are processed. They recognize that the issue in this case is not *whether* the United States will process screened-out Vietnamese migrants' immigrant visa applications, but *where*. They suggest, however, that Section 202(a)'s reference to "priority" in the issuance of a visa incorporates the timing of issuance of a visa, which (they assert, without any authority) "is inextricably related to place of processing." Br. in Opp. 18.

Respondents make little effort to come to terms with Section 222(a). As we explain in our certiorari petition (at 16), that Section separately and directly addresses the issue of consular venue, and gives the Secretary broad discretion to establish regulations for the place of application for immigrant visas. Under respondents' reading of the INA, the Department would have no authority to establish procedures requiring more careful verification of documentation and information about citizens of specific countries associated with terrorism, because the processing time required by that additional verification would

give citizens of other countries a "priority" in the "issuance" of a visa. The flaw in that construction is that such special processing rules do not require any outcome in the ultimate issuance of any visa, which is the subject covered by Section 202(a). And so it is in this case: the Department requires screened-out migrants in Hong Kong to present their applications in their home countries, but, once those applications are filed in the proper location, consular officers may not deny a visa because the applicant is a Vietnamese national. Indeed, Vietnamese nationals have been among the greatest beneficiaries of immigrant visas in recent years. See Pet. 19.

4. Respondents argue (Br. in Opp. 22) that the court of appeals correctly held that they have a cause of action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, to challenge the State Department's policies governing processing of immigrant visa applications by consular officials. Should the en banc court of appeals in *Lisa Le* disagree with our position on that point and hold that aliens residing abroad (or United States sponsors of such aliens) may challenge immigrant visa processing policies under the APA, such a ruling would be contrary to the Eleventh Circuit's decision in *Haitian Refugee Center, Inc.* v. *Baker*, 953 F.2d 1498, 1507, cert. denied, 502 U.S. 1122 (1992), and could have far-reaching consequences for immigration litigation.

Respondents rely on two cases from the 1950s addressing judicial review of deportation and exclusion orders. Br. in Opp. 22. Those cases were decided before the INA was amended in 1961 to overturn one of them, *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956). As we explain in our petition (at 20-21), Congress expressly provided a right under the INA to review of deportation and exclusion orders; it provided no corresponding right to review of visa decisions. Congress's provision for judicial

review in the one situation but not the other provides persuasive evidence that Congress intended to foreclose review in the latter. See *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). And since the INA supplants the APA as the avenue of judicial review in immigration matters (see Pet. 20), there is no judicial review available here.[3]

Rusk v. *Cort*, 369 U.S. 367 (1962), is not to the contrary. There, the Court concluded that Congress had not intended, in the INA, to require that "a native of this country living abroad must travel thousands of miles, be arrested, and go to jail in order to attack an administrative finding that he is not a citizen of the United States." *Id.* at 375. The Court found that the review provisions made available under the INA to natives living abroad who wish to challenge adverse citizenship determinations were optional, and were not intended to deny pre-existing remedies that existed before the 1952 enactment of the INA. *Ibid.* The Court also reached its conclusion in light of the serious constitutional questions that would be presented by a contrary ruling. See *id.* at 370; *id.* at 380-383 (Brennan, J., concurring) (noting that a contrary decision would mean that a person previously deemed to be an American citizen "may by unreviewable administrative

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[3] Respondents invoke Justice Scalia's separate opinion in *INS* v. *Doherty*, 502 U.S. 314, 330 n.1 (1992), where he suggested that the standard of review under the APA is still applicable in judicial review of deportation orders, which, strictly speaking, is taken under the INA. As that opinion noted, however (*ibid.*), the APA itself provides that the proper form of proceeding is, presumptively, "the special statutory review proceeding relevant to the subject matter in a court specified by statute" (see 5 U.S.C. 703)—here, the review proceedings under the INA. There is no support for the proposition that, if Congress foreclosed review of a matter when it enacted the substantive and review provisions of the INA, review might nonetheless be had by resort to the APA alone.

action be relegated to the status of an alien"). Those factors are not present here. Before the enactment of the INA, there was no pre-existing right to judicial review of consular decisions at the behest of aliens abroad, see *Tom We Shung*, 352 U.S. at 184 n.3, 185 n.6—much less at the behest of their sponsors in the United States—and no serious constitutional concern would be raised by a preclusion of judicial review of visa processing decisions at the behest of either.

5. Respondents assert (Br. in Opp. 23-27) that the decision below presents no threat to the operation of the Comprehensive Plan of Action (CPA), including voluntary repatriation, because the United States in the past processed Vietnamese migrants' applications in Hong Kong; because other nations have accepted applications from screened-out Vietnamese in Hong Kong; and because (they contend) most migrants in Hong Kong are concerned about matters other than the United States' immigrant visa processing policy. It was precisely that processing by the United States, however, that led to objections from the United Nations High Commissioner for Refugees (UNHCR) and other CPA signatories, which, in turn, led the United States to re-examine its policy and to make a commitment to other nations that it would no longer process screened-out migrants in Hong Kong. See Pet. 6-7. At the February 1995 and March 1996 meetings of the steering committee administering the CPA, the United States agreed not to consider screened-out Vietnamese migrants for resettlement until they return to Vietnam, because of the effect of such consideration on voluntary repatriation. See Pet. 7.[4]

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[4] As recently as March 28, 1996, the UNHCR representative in Hong Kong also stated that the UNHCR would "regard the full-scale resumption of the processing of immigrant visa applications from

The United States is the destination of choice for the great majority (by far) of migrants in Hong Kong, and the United States has admitted much larger numbers of Vietnamese as refugees and as immigrants than have other countries. It is the United States' policy, therefore, that has the most significant impact on the willingness of the migrants in Hong Kong to cooperate in voluntary repatriation. Leininger Aff. ¶ 15 (June 15, 1995) (*Lisa Le* C.A. App. 199).[5] And even if a screened-out Vietnamese migrant in Hong Kong were not today eligible for an immigrant visa to the United States, he might tomorrow become the beneficiary of an immigration preference by marrying a U.S. citizen or permanent resident, or as a result of an employment-based petition filed by an American employer-sponsor. Sykes Aff. ¶ 10 (Feb. 16, 1996) (lodged with the Clerk with the petition in this case). Thus, as a result of the decision below, even migrants not currently eligible for an immigration preference will be less likely to

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screened-out Vietnamese boat people by the United States as undermining undertakings it has made within the context of the [CPA]," for such processing "would be a disincentive to the voluntary repatriation of the remaining camp population to Vietnam, at a crucial time in our efforts to conclude the CPA in a safe and honorable fashion." See Attach. B to Reply Memorandum in Support of Application for a Stay, *United States Dep't of State, Bureau of Consular Affairs* v. *Lisa Le*, No. A-854 (filed Apr. 18, 1996).

[5] "*Lisa Le* C.A. App." refers to the appendix filed by the government in the court of appeals in *Lisa Le*, along with a brief, when the government requested an expedited appeal and initial hearing en banc, before the court of appeals issued a briefing schedule. We previously referred to that appendix as "the joint appendix filed by the parties" (see Pet. 3 n.1). When the government filed its motion for expedited appeal, brief, and appendix in *Lisa Le*, the government attorneys requested that respondents designate contents for the joint appendix. They declined to do so, taking the position that no brief or appendix should be filed before a briefing order was issued.

return to Vietnam, due to the prospect of processing immigrant visa applications in Hong Kong in the future.

* * * * *

For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be held pending the decision of the en banc court of appeals in *Lisa Le* v. *United States Department of State, Bureau of Consular Affairs*, No. 95-5425 (D.C. Cir.), and then disposed of as appropriate in light of that decision.[6]

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MAY 1996

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[6] In other circumstances, an alternative disposition would be for this Court to grant the petition, vacate the judgment of the court of appeals, and remand to that court for further consideration in light of the order granting initial en banc consideration in *Lisa Le*. The panel below, however, has already denied a motion by the government to vacate its judgment in this case (or stay issuance of its mandate) and to hold the case pending the decision by the en banc court in *Lisa Le*. See Pet. 14.

(5)

No. 95-1521

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v.

LEGAL ASSISTANCE FOR VIETNAMESE
ASYLUM SEEKERS, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

WALTER DELLINGER*
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM R. STEIN*
HUGHES HUBBARD & REED
1300 I Street, N.W.
Washington, D.C. 20005
(202) 408-3600

**Counsel of Record*

Petition for Writ of Certiorari Filed: March 21, 1996
Certiorari Granted: June 17, 1996

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NOTICE

The following opinions have been omitted in printing this appendix because they appear on the following pages in the printed appendix to the petition for a writ of certiorari:

U.S. DISTRICT COURT
USDC DISTRICT OF COLUMBIA (WASHINGTON)

CIVIL DOCKET FOR CASE
No. 94-CV-361

LAVAS, ET AL.

v.

DOS, ET AL.

ASSIGNED TO: JUDGE STANLEY S. HARRIS
Demand: $0,000
Lead Docket: None
Dct No. in other court: None

Nature of Suit: 890

Jurisdiction: *US Defendant*

Filed: 02/25/94

Type D Appeal

RELEVANT DOCKET ENTRIES

2/25/94	1	COMPLAINT filed by plaintiff(s) LAVAS, plaintiff(s) THUA VAN LE, plaintiff(s) EM VAN VO, plaintiff(s) THU HOA THI DANG, plaintiff(s) TRUC HOA THI VO; Exhibits (21) (tth) [Entry date 03/01/94]

2/25/94	2	APPLICATION by plaintiff(s) LAVAS, plaintiff(s) THUA VAN LE, plaintiff(s) EM VAN VO, plaintiff(s) THU HOA THI DANG, plaintiff(s) TRUC HOA THI VO for temporary restraining order; Exhibits (21) (tth) [Entry date 03/01/94]
2/25/94	3	MOTION filed by plaintiff(s) LAVAS, plaintiff(s) THUA VAN LE, plaintiff(s) EM VAN VO, plaintiff(s) THU HOA THI DANG, plaintiff(s) TRUC HOA THI VO for preliminary injunction (tth) [Entry date 03/01/94]
2/25/94	4	MOTION filed by plaintiff(s) LAVAS, plaintiff(s) THUA VAN LE, plaintiff(s) EM VAN VO, plaintiff(s) THU HOA THI DANG, plaintiff(s) TRUC HOA THI VO to certify class action (tth)l [Entry date 03/01/94]
3/2/94	6	ORDER by Judge Stanley S. Harris: denying motion for temporary restraining order [2-1] by TRUC HOA THI VO, THU HOA THI DANG, EM VAN VO, THUA VAN LE, LAVAS; that defendants' opposition to plaintiffs' motion for a preliminary injunction and defendants' dispositive motion shall be filed on 3/15/94, with plaintiffs' reply be filed on 3/29/94 and defendants' reply be filed on 4/5/94; that a hearing on the merits and plaintiff's motion for a preliminary injunction is set for 4/7/94 at 5:00pm. (N) (emh)

3/3/94	9	NOTICE OF INTERLOCUTORY APPEAL by plaintiffs LAVAS, THUA VAN LE, EM VAN VO, THU HOA THI DANG, and TRUC HOA THI VO from order dated 3/2/94 [6-l], denying plaintiffs' motion for a temporary restraining order, entered on: 3/2/94. $5.00 filing fee and $100.00 docketing fee paid by counsel on 3/4/94. Copies mailed to William R. Stein, Esq. and Robert B. Jobe, Esq., counsel for plaintiffs and A.U.S.A. Bernadette Sargeant, counsel for defendants. Copy submitted to Judge Harris. (mlp) [Entry date 03/04/94]
3/7/94	11	CERTIFIED COPY of Order filed in USCA dated 3/6/94, referencing appeal [9-1] , granting request for preliminary injunctive relief; remanding case for further proceedings. USCA # 94-5046 (mbd) [Entry date 03/18/94]
3/21/94	13	MOTION filed by defendant for protective order (mlp) [Entry date 03/24/94]
3/22/94	15	MOTION filed by plaintiffs to compel production of specified documents; exhibit (1) (mlp) [Entry date 03/24/94]
3/24/94	19	ORDER by Judge Stanley S. Harris: denying motion to compel production of specified documents [15-1] by TRUC HOA THI VO, THU HOA THI DANG, EM VAN VO, THUA VAN LE, LAVAS, granting motion for protective order [13-1] by defendants (N) (emh) [Entry date 03/29/94]

3/30/94	20	MOTION filed by plaintiffs LAVAS, THUA VAN LE, EM VAN VO, THU HOA THI DANG, TRUC HOA THI VO for summary judgment; affidavit of Daniel Wolf, evidentiary appendix (bound document) (mlp) [Entry date 03/31/94] [Edit date 03/31/94]
3/30/94	21	RESPONSE by plaintiffs LAVAS, THUA VAN LE, EM VAN VO, THU HOA THI DANG, and TRUC HOA THI VO in opposition to motion to dismiss as to defendants [12-1] by defendants, motion for summary judgment [12-2] by defendants; affidavit of Daniel Wolf, evidentiary appendix (bound document) (mlp) [Entry date 03/31/94] [Edit date 03/31/94]
4/28/94	25	MEMORANDUM AND ORDER by Judge Stanley S. Harris: denying motion for summary judgment [20-1] by TRUC HOA THI VO, THU HOA THI DANG, EM VAN VO, THUA VAN LE, LAVAS, granting motion for summary judgment [12-2] by defendants, denying as moot motion to certify class action [4-1] by TRUC HOA THI VO, THU HOA THI DANG, EM VAN VO, THUA VAN LE, LAVAS, denying as moot motion for preliminary injunction [3-1] by TRUC HOA THI VO, THU HOA THI DANG, EM VAN VO, THUA VAN LE, LAVAS (emh) [Entry date 04/29/94]

5/4/94	27	NOTICE OF APPEAL by plaintiffs LAVAS, THUA VAN LE, EM VAN VO, THU HOA THI DANG, and TRUC HOA THI VO from Memorandum and Order [25-1] dated 4/28/94 and entered on: 4/29/94. $5.00 filing fee and $100.00 docketing fee paid. Copies mailed to counsel for plaintiffs and defendants. (mlp) [Entry date 05/05/94]
5/11/95	28	COPY of Order filed in USCA dated 5/9/95, referencing appear [27-1] remanding case to USDC for a determination of mootness; holding petition for rehearing in abeyance until USDC has determined the issue of mootness. USCA # 94-5104 (mbd)
6/6/95	30	MOTION (renewed) filed by plaintiff LAVAS, plaintiff THUA VAN LE, plaintiff EM VAN VO, plaintiff THU HOA THI DANG, plaintiff TRUC HOA THI VO to certify class action (mlp) [Entry date 06/07/95]
6/6/95	31	MOTION filed by plaintiff LAVAS, plaintiff THUA VAN LE, plaintiff EM VAN VO, plaintiff THU HOA THI DANG, plaintiff TRUC HOA THI VO to join as additional plaintiffs in this action Minh Nguyen, Tran Thi Thanh Xuan, Mandy Yung and Luu Han Vy and deeming the complaint amended to include the addition of these new plaintiffs (mlp) [Entry date 06/07/95]

6/6/95	32	MOTION filed by plaintiff LAVAS, plaintiff THUA VAN LE, plaintiff EM VAN VO, plaintiff THU HOA THI DANG, plaintiff TRUC HOA THI VO for summary judgment on the issue of mootness (mlp) [Entry date 06/07/95]
6/28/95	38	MOTION filed by defendants to dismiss complaint [1-1]; attachment (mlp) [Entry date 06/29/95]
9/11/95	43	MEMORANDUM OPINION by Judge Stanley S. Harris (N) (mlp)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS; THUA VAN LE; EM VAN VO; THU HOA THI DANG; TRUC HOA THI VO, *Plaintiffs-Appellants*

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS; WARREN CHRISTOPHER, SECRETARY OF STATE IN HIS OFFICIAL CAPACITY; MARY A. RYAN, ASSISTANT SECRETARY OF STATE FOR CONSULAR AFFAIRS, IN HER OFFICIAL CAPACITY; DIANE DILLARD, DEPUTY ASSISTANT SECRETARY OF STATE FOR CONSULAR AFFAIRS, IN HER OFFICIAL CAPACITY; RICHARD MUELLER, IN HIS OFFICIAL CAPACITY, CONSULATE GENERAL OF UNITED STATES OF AMERICA; WAYNE LEININGER, CHIEF OF CONSULAR SECTION, IN HIS OFFICIAL CAPACITY, CONSULATE GENERAL OF UNITED STATES OF AMERICA; MATTHEW VICTOR, REFUGEE OFFICER, IN HIS OFFICIAL CAPACITY, CONSULATE GENERAL OF UNITED STATES OF AMERICA, *Defendants- Appellees*

5/10/94	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Leg Asst Vietnamese, Appellant Thua Van Le, Appellant Em Van Vo, Appellant Thu Hoa Thi Dang, Appellant Truc Hoa Thi Vo. [52855-1] (lrn)
5/10/94	MOTION filed (5 copies) by Appellant Leg Asst Vietnamese, Appellant Thua Van Le, Appellant Em Van Vo, Appellant Thu Hoa Thi Dang, Appellant Truc Hoa Thi Vo (certificate of service dated 5/10/94) to expedite case [52970-1] Response due on 5/17/94; (lrn)
6/22/94	PER CURIAM ORDER filed granting motion expedite case filed by Leg Asst Vietnamese, Thua Van Le, Em Van Vo, Thu

Hoa Thi Dang, Truc Hoa Thi Vo [52970-1] Establishing the initial briefing schedule [58795-1]: (Note: This is a Reg case) Appellants' brief due on 7/13/94; Appellants' appendix due on 7/13/94; Appellees' brief due on 8/12/94; Appellants' reply brief due on 8/26/94; An order establishing a date for oral argument shall issue separately. Before Judges Wald, Randolph*, Rogers. [*Judge Randolph would deny the motion to expedite] (lvs)

11/2/94 NOTICE filed by Appellees DOS, et al., informing the court that the Department of State has determined that, effective December 1, 1994, United States Consulates in Hong Kong and other Southeast Asian countries will discontinue immigrant visa processing for Vietnamese asylum seekers who have been determined not to qualify as refugees. [82313-1]. Certificate of service date 11/2/94. (lvs)

2/3/95 OPINION (10 pgs) for the Court filed by Judge Sentelle, DISSENTING OPINION (5 pgs) filed by Judge Randolph. (edb)

3/20/95 PETITION for rehearing [111470-1] and SUGGESTION, for rehearing in banc [111470-2] (19 copies) filed by Appellees DOS, et al. (c/s dated 3/20/95) (jth)

3/30/95 CLERK'S ORDER filed Directing appellant to respond to appellee's petition for rehearing [111470-1]. Response due on 4/14/95. The response shall be limited to the issue of mootness. (jth)

5/10/95 PER CURIAM ORDER filed granting the motion for leave to file filed by Appellees DOS, et al. [119300-1]. The parties disagree as to whether this case is moot, and because resolution of the dispute may require the evaluation of evidence presented by the parties. Directing the Clerk to file the lodged reply [119291-1]. FURTHER ORDERED that the record of this case be remanded to the District Court for a determination of mootness [122567-1]. FURTHER ORDERED that the petition for rehearing be held in abeyance until the District Court has determined the issue of mootness. [111470-1]. Before Judges Edwards, Sentelle, Randolph. (lvs)

9/12/95 SUPPLEMENTAL TRANSMITTAL FROM USDC (District Court decision on remand dated 09/11/95) [148554-1]. (jth)

10/17/95 SUPPLEMENTAL MEMORANDUM on Issues of Mootness in response to Petition for Rehearing and Suggestion for Rehearing In Banc filed by appellants. [156868-1] Copies: 20. Certificate of service date 10/17/95. (lej)

11/6/95 SUPPLEMENTAL BRIEF on Issue of Mootness in response to the petition for rehearing, filed by Appellee's DOS, et al. [160798-1] Copies: 20. Certificate of service date 11/6/95. (jth)

11/21/95 SUPPLEMENTAL REPLY BRIEF filed by Appellant Leg Asst Vietnamese, Appellant Thua Van Le, Appellant Em Van Vo, Appellant Thu Hoa Thi Dang,

Appellant Truc Hoa Thi Vo [164049-1]. Copies: 15. Certificate of service date 11/16/95. (jas)

2/2/96 OPINION (7 pgs) for the Court filed by Judge Sentelle, CONCURRING IN PART AND DISSENTING IN PART OPINION (2 pgs) filed by Judge Randolph. (edb)

2/2/96 PER CURIAM ORDER filed denying appellees' petition rehearing [111470-1] as set forth in the opinion of the Court filed this date. Before Judges Edwards, Sentelle, Randolph. (edb)

2/7/96 MOTION filed (5 copies) by Federal Appellee's DOS, et al. (certificate of service dated 2/7/96) to stay issuance of the mandate pending disposition of the Suggestion for Rehearing In Banc. Response due on 2/14/96. (jth)

2/12/96 PER CURIAM ORDER, In Banc, filed denying the suggestion for rehearing in banc [111470-2] filed by DOS, Warren Christopher, Mary A. Ryan, Diane Dillard, Richard Mueller, Wayne Leininger, Matthew Victor. Before Judges Edwards, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel. Circuit Judges Williams, Ginsburg, Henderson and Randolph would grant the suggestion. (lvs)

2/15/96 MOTION filed (5 copies) by Appellees DOS, et al. (certificate of service dated 2/15/96) to stay issuance of the mandate. (lvs)

2/21/96 PER CURIAM ORDER filed of appellees Motion to Continue Stay of Mandate Pending Disposition of Suggestion for Rehearing In Banc, filed February 7, 1996, the response and reply, and of appellees Motion to Stay Mandate to Permit the Government Time Within Which to Seek a Writ of Certiorari From the Supreme Court, filed February 15, 1996. FURTHER ORDERED that the motion of February 15, 1996 is granted [181265-1]. The Clerk is directed to withhold issuance of the mandate until 3/21/96. FURTHER ORDERED dismissing as moot the motion to stay mandate filed on February 7, 1996 [179292-1]. Before Judges Edwards, Sentelle, Randolph. (lvs)

3/4/96 PER CURIAM ORDER filed that the court treats appellants' opposition to appellee's motion for stay of mandate as a motion for reconsideration of the court's order of February 21, 1996, and that the court denies the motion [184698-1]. Before Judges Edwards, Sentelle, and Randolph. (jth)

3/13/96 MOTION filed (5 copies) by Appellees DOS, et al. (certificate of service dated 3/13/96) (STYLED AS EMERGENCY MOTION TO VACATE JUDGMENT OR, IN THE ALTERNATIVE, TO STAY THE MANDATE, PENDING DISPOSITION OF THE IN BANC PROCEEDING IN LISA LE) [187347-1] [187347-2]. Response due on 3/25/96. (lvs)

3/14/96 PER CURIAM ORDER filed of the emergency motion to vacate judgment or, in the alternative, to stay the mandate, pending disposition of the in banc proceeding in Lisa Le, it is ORDERED that the motion be denied. Before Judges Edwards, Sentelle, Randolph. (Judge Randolph would have ordered a response to the motion) (lvs)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ Action No. ——

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), 2800 JUNIPER ST. #3, FAIRFAX, VA. 22031; THUA VAN LE, 920 WEST LAKESIDE, CHICAGO, ILL. 60640; EM VAN VO, 6408 BEATLINE DR., LONG BEACH, MS. 39560; THU HOA THI DANG, HIGH ISLAND DETENTION CENTER, HONG KONG; TRUC HOA THI VO, HIGH ISLAND DETENTION CENTER, HONG KONG, *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, 2201 C. ST., N.W., WASHINGTON, D.C. 20520; WARREN CHRISTOPHER, SECRETARY OF STATE, IN HIS OFFICIAL CAPACITY, 2201 C. ST., N.W., WASHINGTON, D.C. 20520; MARY A. RYAN, ASSISTANT SECRETARY OF STATE FOR CONSULAR AFFAIRS, IN HER OFFICIAL CAPACITY, 2201 C. ST., N.W., WASHINGTON, D.C., 20520; DIANE DILLARD, DEPUTY ASSISTANT SECRETARY OF STATE FOR CONSULAR AFFAIRS, IN HER OFFICIAL CAPACITY, 2201 C. ST., N.W., WASHINGTON, D.C., 20520; RICHARD MUELLER, CONSUL, IN HIS OFFICIAL CAPACITY, CONSULATE GENERAL OF UNITED STATES OF AMERICA, 26 GARDEN RD., HONG KONG; WAYNE LEININGER, CHIEF OF CONSULAR SECTION, IN HIS OFFICIAL CAPACITY, CONSULATE GENERAL OF UNITED STATES OF AMERICA, 26 GARDEN RD., HONG KONG; MATTHEW VICTOR, REFUGEE OFFICER, IN HIS OFFICIAL CAPACITY, CONSULATE GENERAL OF UNITED STATES OF AMERICA, 26 GARDEN RD., HONG KONG, *Defendants*.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs Legal Assistance for Vietnamese Asylum Seekers; Thua Van Le and Em Van Vo, on behalf of themselves and all others similarly situated (hereinafter "Resident Plaintiffs"); Thu Hoa Thi Dang and Truc Hoa Thi Vo, on behalf of themselves and all others similarly situated (hereinafter "Detained Plaintiffs"), by their undersigned attorneys, as and for their complaint, allege as follows:

PRELIMINARY STATEMENT

1. This is a complaint for a writ of mandamus and for declaratory and injunctive relief arising out of Defendants' illegal refusal to process Detained Plaintiffs' applications for immigrant visas ("IVs") at the United States Consulate General ("U.S. Consulate") in Hong Kong. Defendants' refusal to process these IV applications at the U.S. Consulate in Hong Kong constitutes a dramatic reversal of their past practice and a violation of the Immigration and Nationality Act ("INA"), the binding federal regulations which govern the processing of IV applications, the Administrative Procedure Act ("APA"), and the United States Constitution.

2. Detained Plaintiffs, Thu Hoa Thi Dang ("Mrs. Dang") and Truc Hoa Thi Vo ("Mrs. Vo"), are citizens of the Socialist Republic of Vietnam ("Vietnam") who fled from Vietnam to Hong Kong by boat in May and July of 1991, respectively. Upon arriving in Hong Kong, they were incarcerated in a detention center for Vietnamese boat people, where they have resided since that time.

3. Resident Plaintiffs, Thua Van Le ("Mr. Le") and

Em Van Vo ("Mr. Vo"), are relatives of Detained Plaintiffs and citizens of the United States. They have petitioned the Immigration and Naturalization Service ("INS") under U.S. immigration laws for permission to bring Detained Plaintiffs from Hong Kong to the United States. The INS has approved their petitions.

4. As the beneficiaries of approved IV petitions, Detained Plaintiffs are eligible for IVs, which would entitle them to live and work permanently in this country. In order to obtain their IVs, Detained Plaintiffs must be interviewed at a United States consulate. Defendants are required by regulation to conduct Detained Plaintiffs' personal interviews and the final processing of their IV applications in their country of residence, Hong Kong. 22 C.F.R. § 42.61. In violation of the law, however, Defendants refuse to process Detained Plaintiffs' applications unless and until they return to Vietnam, where Detained Plaintiffs fear that their lives, freedom and right to emigrate would be threatened.

5. This civil action seeks to compel Defendants and the individuals acting under them from implementing their decision to refuse processing Detained Plaintiffs' IV applications at the U.S. Consulate in Hong Kong and to compel them to process such applications, as required by the INA, APA, and controlling federal regulations. *See* 22 C.F.R. § 42.61.

JURISDICTION AND VENUE

6. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331, as a civil action arising under the Constitution, laws, or treaties of the United States; 28 U.S.C. § 1361, as a civil action to compel an officer or employee of the United States to perform a duty owed to plaintiffs; and 8 U.S.C. § 1329, as a civil action arising under the

Immigration and Nationality Act. These actions also are authorized by 5 U.S.C. § 702, as a challenge to agency action under the Administrative Procedure Act; and 28 U.S.C. § 2201 and 2202, as a civil action seeking, in addition to other remedies, a declaratory judgment.

7. Venue is properly in this district pursuant to 28 U.S.C. § 1391(b) and (e)(1) and (2), because at least one defendant in the action resides in this district, and a substantial part of the events or omissions giving rise to the claim occurred in this district. No real property is involved in this action.

PLAINTIFFS

Factual Allegations For Organizational Plaintiff

8. Plaintiff Legal Assistance for Vietnamese Asylum Seekers ("LAVAS") is a not-for-profit corporation, organized and existing under the laws of the State of Virginia, having its principal place of business at 2800 Juniper Street, #3, Fairfax, Virginia, 22031. The principal purpose of LAVAS is to provide legal assistance for Vietnamese nationals detained in Hong Kong and other parts of Southeast Asia, including, in particular, assistance in obtaining refugee status. Since LAVAS was created in December 1991, it has sent eight lawyers and twelve legal assistants to work in Vietnamese refugee camps in Southeast Asia and has assisted over 700 Vietnamese refugees.

9. At all times since its inception, LAVAS has had more demand for its services than its staff and volunteers have been able to meet. Its resources are severely restricted by the amount of funding received from charitable sources. Every added expenditure of time and effort on one case creates a resulting loss for another

potential case. In refusing to process Detained Plaintiffs' IV applications, the U.S. Consulate in Hong Kong is interfering with LAVAS' efforts to provide assistance to its clients and is causing LAVAS to waste its scarce resources fighting to establish that Detained Plaintiffs qualify for refugee status.

Factual Allegations For Individual Plaintiffs

10. Detained Plaintiffs, Mrs. Dang and Mrs. Vo, are natives and citizens of Vietnam. They fled from Vietnam to Hong Kong in May and July of 1991, respectively. Upon arriving in Hong Kong, they were incarcerated in detention centers for Vietnamese boat people where they have resided since that time. They are the beneficiaries of IV petitions that have been approved by the INS. These named plaintiffs also represent other similarly situated Vietnamese nationals who (a) reside or will reside in detention centers in Hong Kong, and (b) are or will become the beneficiaries of IV petitions that have been approved by the INS.

11. Resident Plaintiffs, Thua Van Le ("Mr. Le") and Em Van Vo ("Mr. Vo"), are citizens of the United States. Mr. Le is the husband of Mrs. Dang. Mr. Vo is the father of Mrs. Vo. Each has petitioned the INS for permission to bring their family members from the Vietnamese detention centers in Hong Kong to the United States, and each has obtained INS approval of their petitions. Resident Plaintiffs also represent other similarly situated persons who (1) are or will become citizens or lawful permanent residents of the United States, (2) have family members who are citizens of Vietnam that reside or will reside in Hong Kong and are being or will be detained by the Hong Kong immigration authorities, (3) have petitioned or will petition the INS to bring their family members to the

United States, and (4) have obtained or will obtain approval by the INS of their petitions.

DEFENDANTS

12. Defendant, U.S. Department of State, Bureau of Consular Affairs is the federal agency within the Department of State that is responsible for the administration and enforcement of the INA and all other immigration laws relating to the processing of IV applications by United States consular officers.

13. Defendant, Warren Christopher, is the Secretary of State of the United States. As the highest ranking official in the United States Department of State, he is charged by law with the administration of the provisions of the INA and all other immigration laws relating to (a) the powers, duties, and functions of diplomatic and consular officers of the United States, except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas, and (b) the powers, duties, and functions of the Bureau of Consular Affairs. Defendant Christopher is sued herein in his official capacity.

14. Defendant, Mary A. Ryan, is the Assistant Secretary of State for Consular Affairs and as such is responsible for the administration of the Bureau of Consular Affairs, including its Visa Office, and of the work of United States Consuls in the administration of the immigration laws. Defendant Ryan is sued herein in her official capacity.

15. Defendant, Diane Dillard, is the Deputy Assistant Secretary of State for Visa Services and as such is responsible for ensuring that consular officers process IV applications in accordance with the governing

statutes and regulations. Defendant Dillard is sued herein in her official capacity.

16. Defendant, Richard Mueller, is the Consul of the United States of America in Hong Kong and as such is responsible for processing IV applications that are filed by individuals residing in Hong Kong. Defendant Mueller is sued herein in his official capacity.

17. Defendant, Wayne Leininger, is the Chief of the Consular Section at the U.S. Consulate in Hong Kong and as such is responsible for processing IV applications that are filed by individuals residing in Hong Kong. Defendant Leininger is sued herein in his official capacity.

18. Defendant, Matthew Victor, is a refugee officer at the U.S Consulate in Hong Kong and as such is responsible for implementing U.S. policy relating to Vietnamese nationals detained in Hong Kong and for communicating such policies to Detained Plaintiffs. Defendant Victor is sued herein in his official capacity.

STATEMENT OF FACTS

19. Since 1979, the United States has allocated thousands of its annual refugee admissions, which are limited in number by a presidential order, to Vietnamese boat people. In addition to the refugee program, however, U.S. law provides several other channels through which qualified Vietnamese nationals may immigrate to the United States. *See* 8 U.S.C. §§ 1151-1156. The most important of these channels are the family-based visa categories, which entitle certain immediate relatives of U.S. citizens and lawful permanent residents to obtain IVs, which would allow them to live and work permanently in this country. *See* 8 U.S.C. § 1153(a).

20. In order to obtain an IV, eligible Vietnamese

refugees and their sponsors must complete several steps. First, the sponsoring U.S. citizen or lawful permanent resident—known as the "petitioner"—must file a petition (Form I-130) with the INS, which may either approve or deny the petition. 8 C.F.R. § 204.1(a). Second, if the INS approves the petition, the Vietnamese refugee—the "beneficiary"—must complete an application for an immigrant visa (Form OF-230). 22 C.F.R. § 42.63(a). Third, the beneficiary must appear at a U.S. consulate for final processing of the IV application, including an interview before a consular officer, who will determine whether to grant the visa. 22 C.F.R. § 42.62(a).

21. Under its binding regulations, the U.S. Department of State is required to conduct an IV applicant's consular interview "in the consular district in which the alien resides." 22 C.F.R. § 42.61. The term "residence" is defined as the place of "principal, actual dwelling in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). The fact that a beneficiary does not have a legal status in her country of residence is not relevant. U.S. Department of State, *Foreign Affairs Manual* § 42.61, N.1.2. Under the INA and the United States Constitution, consular officers are prohibited from discriminating against Detained Plaintiffs on the basis of nationality in issuing immigrant visas. 8 U.S.C. § 1152(a).

22. Since June 15, 1988, Vietnamese nationals arriving in Hong Kong without proper immigration documents have been regarded as illegal aliens by the Hong Kong Government and placed in detention centers pending determinations of their status as refugees by the Hong Kong immigration authorities.

23. Detained Plaintiffs, Mrs. Dang and Mrs. Vo, arrived in Hong Kong in May and July of 1991, respectively. Upon their arrival in Hong Kong, they were

placed in detention camps, where they have resided since that time.

24. Resident Plaintiffs, Mr. Le and Mr. Vo, have filed immigrant visa petitions (Form I-130) with the INS on behalf of the Detained Plaintiffs, Mrs. Dang and Mrs. Vo, respectively. The INS has approved each of these petitions. The Detained Plaintiffs have completed all the necessary forms and are, therefore, immediately eligible for an IV interview before a United States consular officer.

25. Because Detained Plaintiffs presently reside in Hong Kong, they are entitled to have their immigrant visa interviews before a consular officer at the U.S. Consulate in Hong Kong.

26. Until approximately September 1993, consular interviews and the final processing of IV applications for Vietnamese nationals who were detained by Hong Kong immigration authorities were conducted in Hong Kong. In approximately September 1993, however, the U.S. Department of State abruptly ended this practice. Since that time, the U.S. Consulate in Hong Kong has refused to process IV applications for Vietnamese residents of Hong Kong who are not legally in the Colony and who have not been recognized as refugees.

27. In violation of the law, Defendants refuse to conduct the Detained Plaintiffs' consular interviews in Hong Kong. Rather, Defendants insist that Detained Plaintiffs return to Vietnam for their consular interviews and the final processing of their immigrant visa applications.

28. Defendants have chosen to disregard the controlling federal regulations, because Detained Plaintiffs are Vietnamese nationals who have not been recognized as refugees by the Hong Kong immigration authorities. Were Detained Plaintiffs nationals of any country but

Vietnam, their applications for an IV would be processed at the U.S. Consulate in Hong Kong, without regard to their status with Hong Kong immigration authorities. Accordingly, Defendants' conduct constitutes discrimination on the basis of nationality in violation of 8 U.S.C. § 1152(a)(1) and the Fifth Amendment to the U.S. Constitution.

29. Plaintiffs have exhausted any administrative remedies that may exist. No other remedy exists for Plaintiffs to resolve Defendants' refusal to comply with 22 C.F.R. § 42.61, the INS, APA, and the U.S. Constitution.

30. Defendants are engaging in a continuing practice of illegally refusing to process the IV applications of Detained Plaintiffs at the U.S. Consulate in Hong Kong. As a result, Plaintiffs have suffered, and will continue to suffer, irreparable injury for which they have no adequate remedy at law. If the relief prayed for is not granted, Detained Plaintiffs will suffer continued detention and separation from their family members in the United States. Similarly, Resident Plaintiffs will suffer continued separation from their family members who are detained in Hong Kong and violation of their Fifth Amendment right to equal protection under the law. The detained plaintiffs are at risk of being forcibly repatriated to Vietnam or of voluntarily repatriating, believe that they have no other choice since they have been informed the U.S. Consulate will not process their IVs in Hong Kong. Those who return or are returned will suffer extreme individual hardship and emotional distress.

31. Detained Plaintiffs are unwilling to return voluntarily to Vietnam, because they fear that their lives or freedom will be threatened, that they will have no means to support themselves, and that the Hanoi regime may deny them permission to exit Vietnam. If Detained Plaintiffs return to Vietnam, they will lose

their rights to procedures offered by the Hong Kong immigration authorities for determining whether they qualify for refugee status.

CLASS ACTION ALLEGATIONS

32. The named individual plaintiffs bring this action pursuant to Rule 23(a) and (b)(2) on behalf of themselves and all other persons similarly situated in the following presently ascertainable classes:

33. All Vietnamese nationals who (a) reside or will reside in detention centers in Hong Kong, and (b) are or will become the beneficiaries of immigrant visa petitions that have been approved by the INS. On information and belief, this group presently contains at least 90 and possibly more than 250 members.

34. All citizens and lawful permanent residents of the United States who (1) have family members who are citizens of Vietnam that reside or will reside in immigration detention centers in Hong Kong, (2) have petitioned or will petition the INS to bring their family members to the United States, and (3) have obtained or will obtain approval by the INS of their petitions. On information and belief, this group presently contains at least 90 and possibly more than 250 members.

35. The questions of law common to each of the plaintiff class members are: (1) Whether Defendants are required to process immigrant visa applications in the consular district in which the IV applicant resides; (2) whether the U.S. Constitution, the INA, and the controlling regulations allow Defendants to discriminate in the processing of visa applications on the basis of nationality; (3) whether the Defendants have violated the rulemaking provisions of the Administrative Procedure Act

by reversing their policy of processing IV applications of detained Vietnamese refugees at the U.S. Consulate in Hong Kong without providing any prior notice or opportunity to affected persons to comment on the change in policy.

36. Plaintiff classes warrant class action treatment because: they are sufficiently numerous; Defendants have acted or threatened to act on grounds generally applicable to each member of each class in that they have refused to process IV applications for Vietnamese nationals who are detained in Hong Kong at the U.S. Consulate in Hong Kong, thus making final mandamus, declaratory and injunctive relief with respect to each class as a whole appropriate; the Plaintiffs are adequate representatives of their classes because their interests are identical to those of the other class members, they have every incentive to pursue this action to a successful conclusion and they are represented by competent legal counsel; and the claims of the named plaintiffs are both common to and typical of the claims of members of each class.

FIRST CAUSE OF ACTION

(Mandamus)

37. Plaintiffs repeat, allege and incorporate paragraphs 1 through 36 above as if fully set forth herein.

38. Pursuant to 22 C.F.R. § 42.61 and 8 U.S.C. § 1152(a)(1), Defendants owe Plaintiffs the duty of processing Detained Plaintiffs' IV applications at the U.S. Consulate in Hong Kong and the duty not to discriminate against Plaintiffs on the basis of their nationality, or the nationality of their family members, in the processing of their IV applications. Defendants, however,

willfully refuse to comply with their duty. Plaintiffs are entitled, therefore, to relief in the nature of mandamus pursuant to 28 U.S.C. § 1361 to compel Defendants to perform their duty to process Detained Plaintiffs' visa applications in a non-discriminatory fashion at the U.S. Consulate in Hong Kong.

SECOND CAUSE OF ACTION

(Violation of the Administrative Procedure Act)

39. Plaintiffs repeat, allege and incorporate paragraphs 1 through 36 above as if fully set forth herein.

40. Plaintiffs are persons aggrieved by agency action under the Administrative Procedure Act. 5 U.S.C. §§ 701 *et. seq.* Defendants' failure to process Detained Plaintiffs' IV applications at the U.S. Consulate in Hong Kong has resulted in Plaintiffs being deprived of their rights to reasonably prompt processing of IV applications under 22 C.F.R. § 42.61 and 8 U.S.C. § 1152(a)(1). Plaintiffs, therefore, are entitled to injunctive relief to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

THIRD CAUSE OF ACTION

(Violation of the Administrative Procedure Act)

41. Plaintiffs repeat, allege and incorporate paragraphs 1 through 36 above as if fully set forth herein.

42. By failing to process Detained Plaintiffs' IV applications in Hong Kong and by implementing a policy that discriminates against nationals of Vietnam, Defendants are acting arbitrarily and capriciously and contrary to law in violation of 5 U.S.C. § 706.

FOURTH CAUSE OF ACTION

(Violation of the Administrative Procedure Act)

43. Plaintiffs repeat and reallege paragraphs 1 through 36 as though fully set forth herein.

44. The policies and practices of Defendants in requiring Detained Plaintiffs to return to Vietnam for the final processing of their IV applications constitute substantive rules that have a substantial impact on the individuals regulated, on their family members in this country, on their legal representatives, and on the general public.

45. Defendants' failure to publish these policy changes in the Federal Register and to allow for notice and comment violates the rulemaking procedures set out in the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*, and renders them void.

FIFTH CAUSE OF ACTION

(Violation of the Immigration and Nationality Act)

46. Plaintiffs repeat, allege and incorporate paragraphs 1 through 36 above as if fully set forth herein.

47. By discriminating against plaintiffs on the basis of their nationality and national origin, Defendants are violating 8 U.S.C. § 1152(a)(1).

SIXTH CAUSE OF ACTION

(Equal Protection)

48. Plaintiffs repeat and reallege paragraphs 1 through 36 as though fully set forth herein.

49. By discriminating against Plaintiffs on the basis of their nationality and national origin, Defendants have

denied Plaintiffs the equal protection of the laws that is guaranteed them under the Fifth Amendment to the U.S. Constitution.

RELIEF REQUESTED

WHEREFORE, Plaintiffs and the members of the classes they represent pray that this Court:

(1) Accept jurisdiction over this action;

(2) Certify each class;

(3) Declare that the practices challenged herein violate the U.S. Constitution, Immigration and Nationality Act and 22 C.F.R. § 42.61;

(4) Issue an order in the nature of mandamus requiring Defendants and those acting under them to comply with 22 C.F.R. § 42.61 and perform their duty to conduct the final processing of the Detained Plaintiffs' visa applications, and all others similarly situated, at the U.S. Consulate in Hong Kong;

(5) Issue a preliminary and permanent injunction enjoining Defendants, their agents, employees and successors in office from implementing their decision to refuse processing of Detained Plaintiffs IV applications;

(6) Issue a preliminary and permanent injunction compelling Defendants, their agents, employees and successors in office to: (a) Immediately notify the Hong Kong Immigration Department, the Hong Kong Refugee Status Review Board and the Office of the United Nations High Commissioner for Refugees in Hong Kong of this Court's order enjoining Defendants from refusing to process the aforementioned visa applications; (b) Immediately notify all beneficiaries of current IV petitions that their applications will be

processed at the U.S. Consulate in Hong Kong; (c) Immediately request the Hong Kong Immigration Department to make available all cases of beneficiaries of current IV petitions to the U.S. Consulate for processing; and (4) Complete processing of IV applications of any beneficiary of a current IV petition in not more than 30 days after such case is made available to the U.S. Consulate for processing.

(7) Grant such other and further relief as this Court deems proper under the circumstances; and

(8) Grant attorney's fees and costs of court.

Respectfully submitted,

Robert B. Jobe
JOBE & MELROD
360 Pine Street
3rd Floor
San Francisco, CA 94104
(415) 956-5513

William R. Stein
D.C. Bar No. 304048
Daniel Wolf
D.C. Bar No. 429697
HUGHES HUBBARD & REED
1300 I Street, N.W.
Suite 900 West
Washington, D.C. 20005
(202) 408-3600

Attorneys for Plaintiffs

Dated: February 24, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-361 SSH

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

ORDER

Before the Court are defendants' motion for a protective order and plaintiffs' motion to compel. Upon careful consideration of the entire record, it hereby is

ORDERED, that defendants' motion for a protective order is granted, and plaintiffs' motion to compel is denied.

SO ORDERED.

Stanley S. Harris
United States District Judge

Date: Mar. 24, 1994

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5104

September Term, 1993

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS; THUA VAN LE; EM VAN VO; THU HOA THI DANG; TRUC HOA THI VO, *Appellants*,

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS; WARREN CHRISTOPHER, SECRETARY OF STATE, ET AL.

Filed Jun 22, 1994

BEFORE: Wald, Randolph and Rogers, Circuit Judges

ORDER

Upon consideration of the motion for expedited consideration of appeal, the opposition thereto and the reply, it is

ORDERED that the motion be granted. *See D.C. Circuit Handbook of Practice and Internal Procedures* 70 (1994). The following briefing schedule shall apply:

Appellants' brief and appendix	July 13, 1994
Appellees' brief	August 12, 1994
Appellants' reply brief	August 26, 1994

An order establishing a date for oral argument shall issue separately.

Per Curiam

* Judge Randolph would deny the motion to expedite.

COMPREHENSIVE PLAN OF ACTION

I. DECLARATION

The Government of the States represented in the International Conference on Indo-Chinese Refugees, held at Geneva from 13 to 14 June 1989,

Having reviewed the problems of Indo-Chinese asylum-seekers in the South-East Asian region,

Noting that, since 1975, over 2 million persons have left their countries of origin in Indo-China and that the flow of asylum-seekers still continues,

Aware that the movement of asylum-seekers across frontiers in the South-East Asian region remains a subject of intense humanitarian concern to the international community,

Recalling United Nations General Assembly Resolution 3455 and the first Meeting on Refugees and Displaced Persons in South-East Asia convened at Geneva in July 1979 under the auspices of the United Nations to address the problem,

Recalling further the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, and related instruments,

Noting with satisfaction that, as a result of combined efforts on the part of Governments and International Organizations concerned, a durable solution has been found for over 1.6 million Indo-Chinese,

Preoccupied however by the burden imposed, particularly on the neighbouring countries and territories, as a result of the continuation of the outflow and the presence of large numbers of asylum-seekers still in camps,

Alarmed by indications that the current arrangements designed to find solutions for the asylum-seekers and resolve problems stemming from the outflow may no

longer be responsive to the size, tenacity and complexity of the problems in the region,

Recognizing that the resolution of the problem of asylum-seekers in the region could contribute positively to a climate of peace, harmony and good-neighbourliness,

Satisfied that the international community, and in particular the countries directly involved, have responded positively to the call for a new international conference made by the States members of the Association of South-East Asian Nations and endorsed by the Executive Committee of the Programme of the United Nations High Commissioner for Refugees at its thirty-ninth session and by the General Assembly at its forty-third session,

Noting the progress achieved towards a solution of this issue by the various bilateral and multilateral meetings held between the parties concerned prior to the International Conference on Indo-Chinese Refugees,

Noting that the issues arising from the presence of Khmer Rouge refugees and displaced persons are being discussed, among the parties directly involved, within a different framework and as such have not been included in the deliberations of the Conference,

Noting with satisfaction the positive results of the Preparatory Meeting for the Conference, held in Kuala Lumpur from 7 to 9 March 1989,

Realizing that the complex problem at hand necessitates the co-operation and understanding of all concerned and that a comprehensive set of mutually reenforcing humanitarian undertakings, which must be carried out in its totality rather than selectively, is the only realistic approach towards achieving a durable solution to the problem,

Acknowledging that such a solution must be developed in the context of national laws and regulations as well as of international standards,

Have solemnly resolved to adopt the Comprehensive Plan of Action.

II. COMPREHENSIVE PLAN OF ACTION

A. Clandestine departures

1. Extreme human suffering and hardship, often resulting in loss of lives, have accompanied organized clandestine departures. It is therefore imperative that humane measures be implemented to deter such departures, which should include the following:

(a) Continuation of official measures directed against those organizing clandestine departures, including clear guidelines on these measures from the central government to the provincial and local authorities.

(b) Mass media activities at both local and international level, focusing on:

(i) The dangers and hardships involved in clandestine departures;

(ii) The institution of a status-determination mechanism under which those determined not to be refugees shall have no opportunity for resettlement;

(iii) Absence of any advantage, real or perceived, particularly in relation to third-country resettlement, of clandestine and unsafe departures;

(iv) Encouragement of the use of regular departure and other migration programmes;

(v) Discouragement of activities leading to clandestine departures.

(c) In the spirit of mutua1 co-operation, the countries

concerned shall consult regularly to ensure the effective implemention and co-ordination of the above measures.

B. Regular departure programmes

2. In order to offer a preferable alternative to clandestine departures, emigration from Viet-Nam through regular departure procedures and migration programmes, such as the current Orderly Departure Programme, should be fully encouraged and promoted.

3. Emigration through regular departure procedures and migration programmes should be accelerated and expanded with a view to making such programmes the primary and eventually the sole modes of departure.

4. In order to achieve this goal, the following measures will be undertaken:

(a) There will be a continuous and widely publicized media campaign to increase awareness and regular departure procedures and migration programmes for departure from Viet-Nam.

(b) All persons eligible under regular third-country migration programmes, Amerasians and former re-eduation center detainees will have full access to regular departure procedures and migration programmes. The problem of former re-education center detainees will be further discussed separately by the parties concerned.

(c) Exit permits and other resettlement requirements will be facilitated for all persons eligible under regular departure procedures and migration programmes.

(d) Viet-Nam will fully co-operate with the United Nations High Commissioner for Refugees (UNHCR) and the Intergovernmental Committee for Migration (ICM) in expediting and improving processing, including

medical processing, for departures under regular departure procedures and migration programmes and will ensure that medical records of those departing comply with standards acceptable to receiving countries.

(e) Viet-Nam, UNHCR, ICM and resettlement countries will co-operate to ensure that air transportation and logistics are sufficient to move expeditiously all those accepted under regular departure procedures and migration programmes.

(f) If necessary, countries in South-East Asia through which people emigrating under regular departure procedures and migration programmes must transit will, with external financial support as appropriate, expand transit facilities and expedite exit and entry procedures in order to help facilitate increased departures under such programmes.

C. Reception of new arrivals

5. All those seeking asylum will be given the opportunity to do so through the implementation of the following measures:

(a) Temporary refuge will be given to all asylum-seekers, who will be treated identically regardless of their mode of arrival until the status-determination process is completed.

(b) UNHCR will be given full and early access to new arrivals and will retain access, following the determination of their status.

(c) New arrivals will be transferred, as soon as possible, to a temporary asylum centre where they would be provided assistance and full access to the refugee status-determination process.

D. Refugee status

The early establishment of a consistent region-wide refugee status-determination process is redesigned and will take place in accordance with national legislation and internationally accepted practice. It will make specific provision, *inter alia*, for the following:

(a) Within a prescribed period, the status of the asylum-seeker will be determined by a qualified and competent national authority or body, in accordance with established refugee criteria and procedures. UNHCR will participate in the process in an observer and advisory capacity. In the course of that period, UNHCR shall advise in writing each individual of the nature of the procedure, of the implications for rejected cases and of the right to appeal the first-level determination.

(b) The criteria will be those recognized in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, bearing in mind, to the extent appropriate, the 1948 Universal Declaration of Human Rights and other relevant international instruments concerning refugees, and will be applied in a humanitarian spirit taking into account the special situation of the asylum-seekers concerned and the need to respect the family unit. A uniform questionnaire will be the basis for interviews and shall reflect the elements of such criteria.

(c) The Handbook on Procedures and Criteria for Determining Refugee Status issued by the UNHCR, will serve as an authoritative and interpretative guide in developing and applying the criteria.

(d) The procedures to be followed will be in accordance with those endorsed by the Executive Committee of the Programme of the United Nations High Commissioner for Refugees in this area. Such procedures will include, *inter alia*:

(i) The provision of information to the asylum-seekers about the procedures, the criteria and the presentation of their cases;

(ii) Prompt advice of the decision in writing within a prescribed period;

(ii) A right of appeal against negative decisions and proper appeals procedures for this purpose, based upon the existing laws and procedures of the individual place of asylum, with asylum-seeker entitled to advice, if required, to be provided under UNHCR auspices.

UNHCR will institute, in co-operation with the Govemments concerned, a comprehensive regional-training programme for officials involved in the determination process with a view to ensuring the proper and consistent functioning of the procedures and application of the criteria, taking full advantage of the experience gained in Hong Kong.

E. Resettlement

8. Continued resettlement of Vietnamese refugees benefiting from temporary refuge in South-East Asia is a vital component of the Comprehensive Plan of Action.

1. Long-stayers Resettlement Programme

9. The Long-stayers Resettlement Programme includes all individuals who arrived in temporary asylum camps prior to the appropriate cut-off date and would contain the following elements:

(a) A call to the international community to respond to the need for resettlement, in particular through participation by an expanded number of countries, beyond those

few currently active in refugee resettlement. The expanded number of countries could include, among others, the following: Australia, Austria, Belgium, Canada, Denmark, Germany, Federal Republic of, Finland, France, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, United Kingdom and United States of America.

(b) A multi-year commitment to resettle all the Vietnamese who have arrived in temporary asylum camps prior to an agreed date, except those persons already found not to be refugees under established status-determination procedure and those who express the wish to return to Viet-Nam. Refugees will be advised that they do not have the option of refusing offers of resettlement, as this would exclude them from further resettlement consideration.

2. Resettlement Program for Newly-Determined Refugees

10. The Resettlement Program for Newly-Determined Refugees will accommodate all those arriving after the introduction of status determination procedures and who are determined to be refugees. Within a designated period after their transfer to the resettlement area, those determined to be refugees shall receive an orientation briefing from a UNHCR representative that explains the third-country resettlement programme, the length of time current arrivals may expect to spend in camp awaiting resettlement, and the necessity of adhering to the rules and regulations of the camp.

11. Whenever possible, a pledge shall be sought from the resettlement countries to place all those determined to be refugees, except those expressing the wish to return to Viet-Nam, within a prescribed period. It shall

be the responsibility of UNHCR, with the full support of all the resettlement countries and countries of asylum, to co-ordinate efforts to ensure that departures are effected within that time.

F. Repatriation—Plan of Repatriation

12. Persons determined not to be refugees should return to their country of origin in accordance with international practices reflecting the responsibilities of States toward their own citizens. In the first instance, every effort will be made to encourage the voluntary return of such persons.

13. In order to allow this process to develop momentum, the following measures will be implemented:

(a) Widely publicized assurances by the country of origin that returnees will be allowed to return in conditions of safety and dignity and will not be subject to persecution.

(b) The procedure for readmission will be such that the applicants would be readmitted within the shortest possible time.

(c) Returns will be administered in accordance with the above principles by UNHCR and ICM, and internationally funded re-integration assistance will be channelled through UNHCR, according to the terms of the Memorandum of Understanding signed with Viet-Nam on 13 December 1988.

14 If, after the passage of reasonable time, it becomes clear that voluntary repatriation is not making sufficent progress towards the desired objective, alternatives recognized as being acceptable under international practices would be examined. A regional holding centre under the

auspices of UNHCR may be considered as an interim measure for housing persons determined not to be refugees pending their eventual return to the country of origin.

15. Persons determined not to be refugees shall be provided humane care and assistance by UNHCR and international agencies pending their retum to the country of origin. Such assistance would include educational and orientation programmes designed to encourage return and reduce re-integration problems.

G. Laotian asylum-seekers

16. In dealing with Laotian asylum-seekers, future measures are to be worked out through intensified trilateral negotiations between UNHCR, the Lao People's Democratic Republic and Thailand, with the active support and co-operation of all parties concerned. These measures should be aimed at:

(a) Maintaining safe arrival and access to the Lao screening process;

(b) Accelerating and simplifying the process for both the return of the screened out and voluntary repatriation to the Lao People's Democratic Republic under safe, humane and UNHCR-monitored conditions.

17. Together with other durable solutions, third-country resettlement continues to play an important role with regard to the present camp population of the Laotians.

H. Implementation and review procedures

18. Implementation of the Comprehensive Plan of Action is a dynamic process that will require continued

co-ordination and possible adaptation to respond to changing situations. In order to ensure effective implementation of the Plan, the following mechanisms shall be established:

(a) UNHCR, with the financial support of the donor community, will be in charge of continuing liaison and co-ordination with concerned Governments and intergovernmental as well as non-governmental organizations to implement the Comprehensive Plan of Action.

(b) A Steering Committee based in South-East Asia will be established. It will consist of representatives of all Governments making specific commitments under the Comprehensive Plan of Action. The Steering Committee will meet periodically under the chairmanship of UNHCR to discuss implementation of the Comprehensive Plan of Action. The Steering Committee may establish sub-committes as necessary to deal with specific aspects of the implementation of the Plan, particularly with regard to status determination, return and resettlement.

(c) A regular review arrangement will be devised by UNHCR, preferably in coinjunction with the annual Executive Committee session, to assess progress in implementation of the Comprehensive Plan of Action and consider additional measures to improve the Plan's effectiveness in meeting its objectives.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. ——

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL ., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

AFFIDAVIT OF MICHAEL T. DARWYNE

I, Michael T. Darwyne, Barrister, of Gilt Chambers, 1103 Far East Finance Centre, 16 Harcourt Road, Hong Kong, make oath and say as follows:

1. I am a barrister practicing in Hong Kong at the above address. I was admitted to the English Bar in 1969 and to the Hong Kong Bar in 1986. From 1986 to 1990 I served as Crown Counsel in the Legal Department of the Hong Kong Government. Since 1990 I have been in private practice at the Hong Kong Bar. My practice is predominantly in the field of public law with particular reference to refugee status determination of Vietnamese asylum seekers. I have been counsel or co-counsel in the two leading High Court judicial reviews of decisions of the Immigration Department and Refugee Status Review Board. I have also given legal advice to many Vietnamese asylum seekers in relation to their claims for refugee status. I am familiar with the Hong Kong Immigration Ordinance, the Comprehensive Plan of Action and international instruments affecting refugees.

2. I have been asked whether a Vietnamese asylum seeker detained in a Hong Kong Detention Centre is legally entitled to attend for an interview with a United States Consular officer at the premises of the United States Consul General at 26 Garden Road, Hong Kong. This raises questions of law and practise concerning the treatment of Vietnamese asylum seekers in Hong Kong which I am qualified to answer.

3. Section 13D(2) of the Hong Kong Immigration Ordinance, Chapter 115 of the Laws of Hong Kong, (Exhibit No. 1) provides:

> "Every person detained under this section shall, be permitted all reasonable facilities to enable him to obtain any authorization required for entry to another state or territory or, whether or not he has obtained such authorization, to leave Hong Kong."

4. By virtue of this section, every Vietnamese detainee has the right to expect that he will be permitted all reasonable facilities to enable him to obtain a visa to a third country, or, if he has travel arrangements, to leave Hong Kong. The section is used to permit those detainees who have either not yet been recognised as refugees by the Hong Kong Government, or who have been denied refugee status by the Hong Kong Government, to exit the Detention Centre in order to complete marriage formalities with overseas nationals; to attend at embassies to complete visa processing and medical checks and then to proceed to a Departure Centre near the airport prior to departing to join their spouse overseas under family reunion programmes or under direct visas. An example of such a request is attached. (Exhibit No. 2)

5. In my opinion, if a detainee was to be a refused a request made to the appropriate Hong Kong Govern-

ment authorities by a foreign consulate or embassy for a Vietnamese detainee to be allowed to attend upon the premises of the foreign consulate or embassy for the purpose of an interview to enable him to obtain any authorization required for entry to that state, the detainee would be entitled to apply to the High Court for leave to seek judicial review of that refusal and to include as part of his prayer for relief a claim for an order of Mandamus pursuant to Order 53 of the Rules of the Supreme Court of Hong Kong, ordering the relevant officials to enable him to so attend. Since the language of section 13D(2) is mandatory and permits of no exceptions, such an application would almost certainly succeed.

6. The position would, in my view, be exactly the same if the request was made by the detainee himself, rather than by the foreign consulate or embassy, except that a burden would rest upon the detainee to establish that his request was a legitimate one in the sense that he actually had been given an appointment by the consulate or embassy for an interview to enable him to obtain any authorization required for entry to that state.

7. The administrative mechanism whereby a detainee is authorised to leave a Detention Centre is provided for by Rule 28 of the Immigration (Vietnamese Boat People) (Detention Centres) Rules, Cap. 115 (Exhibit No. 3) which says: -

> "(1) The Superintendent may, if he sees fit, permit a detainee to be absent from the detention centre for such purpose, during such period and on such terms as the Superintendent may specify."

8. To my personal knowledge this Rule has been used, for example, to allow detainees to leave the Centre to attend for a large variety of purposes, including to have music tuition, to buy daily necessities and have dinner,

to attend at a children's concert, and to spend a honeymoon weekend with a newly acquired spouse.

9. There are now produced and shown to me marked Exhibits numbered MTD-1, a copy of the documents referred to above as Exhibits numbered 1 through 3 respectively.

Sworn at

this 31st of January 1994

BEFORE ME

_____

Pat Bossy Ying Ho

NOTARY PUBLIC

AFFIDAVIT OF MICHAEL T. DARWYNE

EXHIBITS

This is the Exhibit marked "MTD-1" referred to in the Affidavit of MICHAEL T. DARWYNE sworn before me this 31st day of 1994.

Signed ——————————

Notary Public

Exhibit Marked	*Description*	*No. of Pages Including This Page*
MTD-1	Extract of Immigration Ordinance and Regulations. Six(6) Letter	

Ho & Chan
Solicitors & Noataries
12/Floor Fung House
19-20 Connaught Road
HONG KONG

EXHIBIT NO: 1

CHAPTER 115

IMMIGRATION ORDINANCE

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Section

PART III

CONTROL OF IMMIGRATION

PART IIIA

VIETNAMESE REFUGEES

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PART IV

SUPPLY OF PARTICULARS BY ALIENS AND BY PERSONS STAYING; IN HOTELS OR OTHER LODGING; PLACES

PART IVA

REQUIREMENT TO CARRY PROOF OF IDENTITY

PART IVB

13C. Designation refugee centres

(1) The Secretary for Security may by order desingate any place as a refugee centre for the residence or detention of Vietnamese refugees. (*Amended 42 of 1982 s. 6*)

(2) The Secretary for Security may make rules providing for the treatment, and control of conduct, of Vietnamese refugees in refugee centres and for the management and security of, and the maintenance of order, discipline, cleanliness and hygiene in, refugee centres, and different rules may be made in respect of different centres. (*Replaced 42 of 1982 s. 6*)

(3) Without prejudice to the generality of subsection (2), rules made under that subsection may provide for—

(*a*) contravention of any provision thereof to be punished by the imposition of a penalty not exceeding $500 and by separate confinement for a period not exceeding 28 days; (*Amended 42 of 1982 s. 6*)

(*b*) the confinement of persons punished by separate confinement;

(*c*) the imposition, by a specified public officer, of such punishment for such contravention;

(*d*) appeals against the imposition of punishment and the practice and procedure relating to such appeals;

(*e*) the payment and the disposal of monetary penalties in any manner whatsoever.

(4) Any refugee centre designated as a refugee centre for the detention of Vietnamese refugees shall be under the control and management of the Commissioner of Correctional Services and notwithstanding section 13A or 13D, any Vietnamese refugee detained therein may be removed by the Commissioner of Correctional Services from such refugee centre to any other refugee centre so designated. (*Added 42 of 1982 s. 6*)

(5) Without prejudice to the generality of subsection (2) rules made under that subsection in respect of any refugee centre designated as a refugee centre for the detention of Vietnamese refugees may provide for—

(*a*) the powers, duties, conduct and discipline of officers of the Correctional Services Department and other persons employed in refugee centres;

(*b*) the duties and powers of visiting justices;

(*c*) the conditions under which visitors may be allowed to visit refugee centres. (*Added 42 of 1982 s. 6*)

13D. Detention pending decision as to permission to remain in Hong Kong, or pending removal from Hong Kong

(1) As from 2 July 1982 any resident or former resident of Vietnam who—

(a) arrives in Hong Kong not holding a travel document which bears an unexpired visa issued by or on behalf of the Director; and

(b) has not been granted an exemption under section 61(2).

may, whether or not he has requested permission to remain in Hong Kong, be detained under the authority of the Director in such detention centre as an immigration officer may specify pending a decision to grant or refuse him permission to remain in Hong Kong or, after a decision to refuse him such permission, pending his removal from Hong Kong, and any child of such a person, whether or not he was born in Hong Kong and whether or not he has requested permission to remain in Hong Kong, may also be so detained, unless that child holds a travel document with such a visa or has been granted an exemption under section 61(2). (*Replaced 52 of 191 s. 2*)

(1A) The detention of a person under this section shall not be unlawful by reason of the period of the detention if that period is reasonable having regard to all the circumstances affecting that person's detention, including—

(*a*) in the case of a person being detained pending a decision under section 13A(1) to grant or refuse him permission to remain in Hong Kong as a refugee—

(i) the number of persons being detained pending decisions under section 13A(1) whether to grant or refuse them such permission; and

(ii) the manpower and financial resources allocated to carry out the work involved in making all such decisions;

(*b*) in the case of a person being detained pending his removal from Hong Kong—

(i) the extent to which it is possible to make arrangements to effect his removal; and

(ii) whether or not the person has declined arrangements made or proposed for his removal. (*Added 52 of 1991 s. 2*)

(1B) The detention of a person under this section pending a decision under section 13A(1) to grant or refuse him permission to remain in Hong Kong as a refugee shall not be unlawful by reason that other persons (who may or may not have arrived in Hong Kong after the detainee) who were detained pending decisions under section 13A(1) to grant or refuse them such permission were granted or refused such permission within periods shorter than the period of the person's detention. (*Added 52 of 1991 s. 2*)

(2) Every person detained under this section shall be permitted all reasonable facilities to enable him to obtain any authorization required for entry to another state or territory or, whether or not he has obtained such authorization, to leave Hong Kong.

(3) Where a person is detained under subsection (1) after a decision under section 13A(1) to refuse him permission to remain in Hong Kong as a refugee, such person as the Director may authorize for the purpose shall serve on the detained person a notice in such form as the Director may specify notifying him of his right to apply for a review under section 13F(1). (*Added 23 of 1989 s. 3 Amended 52 of 1991 s. 2*)

(4) Notice under subsection (3) may be served

(*a*) personally, or

(*b*) by displaying it in some prominent place within the area where the person concerned is detained

in such a manner that it may be cconveniently read by him. (*Added 23 of 1989 s. 3*)

*(5) For the avoidance of doubt, it is hereby declared that any person detained under subsection (1) in any place may, under the authority of the Director of Immigration, be transferred from that place and detained in any other place or places specified by the Director of Immigration. (*Added 52 of 1991 s. 2*)

(6) Notwithstanding subsection (5), a person detained under subsection (1) in a detention centre shall not be transferred from that detention centre to another detention centre on the ground that his transfer is necessary in the interests of order or good management in the first mentioned detention centre unless the Director of Immigration has

(*a*) certified that his transfer is so necessary; and

(*b*) caused written notice to be served on the person informing him of the ground on which he is to be so transferred. (*Added 52 of 1991 s. 2*)

(7) A certificate purporting to be signed by the Director of Immigration stating that the transfer, from one detention centre to another, of a person detained under subsection (1) is necessary in the interests of order or good management in the detention centre in which the person is detained shall be admitted in evidence in any proceedings on its production without further proof and, until the contrary is proved, shall be presummed to have been signed by the Director of Immigration. (*Added 52 of 1991 s.* 2)

(8) If, before 31 May 1991, any person detained under

*Note: As to operation of section 13D(5), see 52 of 1991 section 1(2) and (3).

subsection (1) in any place was, under the authority of any public officer other than the Director of Immigration, transferred from that place and detained in any other place specified by that public officer, the Director of Immigration shall be deemed to have delegated that public officer to exercise on his behalf the powers conferred on him in that respect. (Added 52 of 1991 s. 2)

(*Added 42 of 1982 s. 7*)

13DA. Appeals against transfer on ground of order or good management

(1) If

(*a*) any person detained under section 13D(1) is transferred from one detention centre to another, and

(*b*) the Director of Immigration has certified that the transfer is necessary in the interests of order or good management in the detention centre from which he was transferred,

the person may appeal against the transfer to the officer appointed by the Secretary for Security under section 13H(2) to have control and management of the detention centre from which he is transferred (the "relevant officer")

(2) A person who wishes to appeal under subsection (1) shall serve written notice of appeal, stating his grounds of appeal and the facts upon which he relies, upon the superintendent of the detention centre to which he is transferred, within 48 hours after his transfer to that detention centre; but such notice shall not preclude the person from raising other facts prior to the determination of his appeal by the relevant officer and relying upon those facts.

(3) An appeal under subsection (1) shall be considered by the relevant officer, who may confirm, vary or cancel the transfer.

(4) A decision of the relevant officer under subsection (3) shall be final.

(5) In this section, "superintendent of the detention centre" means the person appointed to be in charge of the detention centre by the officer appointed by the Secretary for Security under Section 13H(2) to have control and management of the detention centre.

(*Added 52 of 1991 s. 3*)

13E. Removal from Hong Kong of Vietnamese refugees and persons detained under section 13D

(1) The Director may at any time order any Vietnamese refugee or person detained in Hong Kong under section 13D to be removed from Hong Kong.

(2) An immigration officer or a chief immigration assistant may remove from Hong Kong in accordance with section 24 any person order to be removed from Hong Kong under subsection (1). (*Amended 65 of 1989 s. 3*)

(*Added 42 of 1982 s. 7*)

13F. Review by a Refugee Status Review Board

(1) Any person on whom a notice is served under section 13D(3) may, within 28 days of such service, apply to the Board to have the decision that he may not remain in Hong Kong as a refugee reviewed.

(2) An application for a review under this section may be made on behalf of a child by his parent or any person having care of the child.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

DECLARATION OF EM VAN VO

I, Em Van Vo, declare:

1. My name is Em Van Vo. My current residence is at 6408 Beatline Dr., Long Beach, Mississippi. I am a citizen of the United States and a native of Vietnam, born on October 10, 1950 in Da Nang, Central Vietnam.

2. In 1969, I married Nam Thi Nguyen. We have four children, three daughters and one son, who are all also natives of Vietnam. My three daughters are: Truc Hoa Thi Vo, born in 1970; Truc Trang Thi Vo, born in 1974; and Truc Nhung Thi Vo, born in 1977. Our son is Thanh Chi Vo, born in 1978.

3. My wife, my daughter, Truc Trang, and my son reside with me in Long Beach. My daughter, Truc Nhung, resides in Vietnam. My daughter, Truc Hoa, resides in the High Island Detention Center in Hong Kong, where she has been living in captivity since July 1991.

4. Before the fall of Saigon in 1975, I was a corporal in the Navy of the Republic of Vietnam (NRVN). I had

joined the NRVN in 1969 and, from 1971 to 1975, I served at Naval Headquarters for the First Strategic Zone in Da Nang. During this time, I was assigned to accompany U.S. military advisers on a patrol boat whose mission it was to escort and protect the transfer of ammunition from the U.S. Naval fleet to Da Nang Port. During some of these missions, we intercepted and arrested fishermen who trespassed into military security zones. A number of these fishermen were imprisoned after police investigation revealed that they were communist infiltrators.

5. After the communist takeover of South Vietnam in April 1975, I was sent to a re-education camp for two weeks. One year later, in May 1976, I was denounced by several of the communist infiltrators I had previously helped to arrest and, consequently, was arrested by communist security forces on charges of having committed crimes against the revolution. I was sent to a re-education camp where I was imprisoned for the next 15 months and forced to do hard labor from dawn to dusk.

6. After my release in August 1977, my activities were closely monitored by the communist security forces. During the remaining time that I spent in Vietnam, I eked out a meager existance as a fisherman and plotted my escape from the country.

7. On June 24, 1979, I escaped Vietnam by boat, leaving my family behind. Following my escape, life became even more difficult for my wife and children who were barely able to survive off the money my wife made by selling fish in the market.

8. In October 1980, I was resettled in the United States. For the next ten years, I dreamed of re-uniting with my wife and children.

9. Finally, in July 1990, my wife escaped to Hong

Kong with my son. One year later, in July 1991, my daughter, Truc Hoa, escaped to Hong Kong with her husband, Vui Van Phan, and the elder of her two children. My other daughter, Truc Tran, escaped with Truc Hoa on the same boat. Truc Hoa was pregnant when she escaped and her third child was born in Hong Kong in October 1991.

10. In September 1992, my wife, my son and my daughter, Truc Tran, were permitted to immigrate to the United States based on my status as a U.S. Citizen. My other daughter, Truc Hoa, remains incarcerated in the High Island Detention Center, having been denied refugee status by the Hong Kong Immigration Department.

11. On October 29, 1991, I filled out an I-130 petition for an immigrant visa for Truc Hoa and filed the completed form with the Immigration and Naturalization Service ("INS") on October 31. (Exhibit A) Also, on October 29, I filed an Affidavit of Relationship with the United States Catholic Conference. (Exhibit B) In or around early April 1993, I was informed by the INS that my petition for Truc Hoa had been approved.

12. On April 20, 1993, John Olson, a Refugee Officer with the Joint Voluntary Agancy ("JVA") (the agency which administers the U.S. refugees program in Hong Kong), wrote to inform me that Truc Hoa "can be interviewed for admission to the United States," but that "before we can approve your relatives to join in the United States, you must prepay their transportation and visa fee costs." He further advised me that as soon as payment is credited "and your relatives have been determined to be eligible for immigrant visas to the United States, action will be taken to arrange for their departure from Hong Kong. You will be notified of the place and time of their scheduled destination so that you may meet them when they arrive in the U.S." (Exhibit C) In accordance with this request, I prepaid Truc Hoa's transportation and

visa fee costs, completed the necessary forms, and forwarded them to the JVA in Hong Kong. (Exhibit D)

13. On December 15, 1993, however, Mr. Matthew Victor, a refugee officer of the U.S. Consulate General in Hong Kong, wrote to inform me that the Consulate General would not process Truc Hoa's visa application in Hong Kong and that if she wanted to join her family in tho United States she would first have to return to Vietnam. (Exhibit E) I was confused, angered and saddened by Mr. Victor's letter. I could not understand why the Consulate General was refusing to process my daughter's case and asking her to return to Vietnam when, just six months before, the JVA had informed me that she was eligible to be interviewed for an immigrant visa. I was so upset that I could neither work nor sleep.

14. I am extremely worried and distressed that my daughter remains detained in Hong Kong. I have not seen her for more than fifteen years and long to be reunited with her and to see my grandchildren who I have never met. I am also very concerned for my daughter's and her family's well-being because I have heard about how deplorable the conditions are in the camps in Hong Kong and how dangerous it is to live there.

15. My daughter is unwilling to return to Vietnam. She left Vietnam at great risk seeking freedom and a chance to reunite with her family in the United States. Seh is unwilling to go back to Vietnam to face an uncertain future and without any guarantee that the communist authorities will permit her to leave the country.

16. I, Em Van Vo, declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in conformity with 28 U.S.C. § 1746 in Long Beach, Mississippi, on February 16, 1994.

_____

Em Van Vo

JOINT VOLUNTARY AGENCY
U.S. REFUGEE
PROGRAM • HONG KONG

April 20, 1993

Vo Van Em
6408 Beatline Dr
Long Beach, MS 39560

Dear Mr Vo

Re: Vo Thi Truc Hoa (4) IV#1992515039

This is is to inform you that the above-mentioned persons can be interviewed for immigrant visas for admission to the United States. However, before we can approve your relatives to join you in the United States, you must prepay their transportation and visa fee costs.

As of October 1, 1988, transportation and visa fees must be paid in advance for all persons entering the United States on Immigrant Visa Petitions, including those from East Asian refugee camps, as well as directly from Vietnam under the Orderly Departure Program. Family members in the U.S. who have filed Immigrant Visa Petitions (Form I-130) vith the Immigration and Naturalization Service on behalf of their relatives in Vietnam or in first asylum camps will be required to prepay the transportation and visa fee costs before their relatives can be approved for departure from Vietnam or countries of first asylum.

As of November 1, 1991 the visa fee is currently US$ 200.00 per person, and the cost of transportation from

Hong Kong is US$ 634.00 for each person over twelve years of age.

Elimination of the past practice of issuing transportation loans for travel of immigrants from Southeast Asia will bring the above policy into conformity with worldwide policy.

Your certified check or money order made payable to the *International Organization for Migration (IOM)* in the amount of US$ 2,456.00 should be mailed as soon as possible to the following address:

International Organization for Migration
Attn: Immigrant Program
1123 Broadway, Suite 717
New York, New York 10010

In order to ensure that notice of the receipt of payment is correctly attributed to your relatives, please write the case numbers on the check and enclose the duplicate copy of this letter with your payment.

Please remember that approval for your relatives' departure from Hong Kong will not be given unless your payment has been received by IOM. For this reason, you should send IOM your certified check or money order as soon as possible.

As soon as your payment has been credited to IOM's account, and your relatives have been determined to be eligible for immigrant visas to the United States, action will be taken to arrange for their departure from Hong Kong. You will be notified of the place and time of their scheduled destination so that you may meet them when they arrive in the U.S.

In the event that your relatives are determined not eligible for immigrant visas, all prepaid transportation fees will return to you. The visa fees will be forfeited.

Thank you for your timely action in assisting your family's departure from Hong Kong.

Sincerely

_____

John Olson
Refugee Officer

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

HONG KONG

December 15, 1993

Vo Van Em
6408 Beachline Road,
Long Beach, MS

RE: Vo Thi Truc Hoa VRD 481/82/91

Dear Mr. Em:

I am writing in connection with the immigrant visa request of your daughter, Vo Thi Truc Hoa. According to our records, you filed an F-3 family preference visa petition on Hoa's behalf on October 31, 1991. The F-3 visa petition for Hoa is now current, which means the immigrant visa case can be processed.

The U.S. government supports the Comprehensive Plan of Action (CPA) governing the screening of asylum seekers in Hong Kong. Under the CPA, those not recognized as refugees as defined by international criteria must return to Vietnam to pursue resettlement in a third country. Vo Thi Truc Hoa has not been granted refugee status. Since she has been screened out, she must therefore return to Vietnam.

However, since Hoa is the beneficiary of a current immigrant visa petition, she is eligible to apply for a U.S. immigrant visa once she returns to Vietnam. She may process her immigrant visa application through the Orderly Departure Program (ODP) which operates through the U.S. Embassy in Bangkok. After Hoa departs Hong Kong, we will transfer her file to ODP.

For more information on the ODP program, you may contact the ODP office. Their address is:

ORDERLY DEPARTURE PROGRAM
9th Floor Panjabhum Building
127 South Sathorn Tai Road
Bangkok 10120 Thailand

I am sorry that I cannot assist Vo Thi Truc Hoa to pursue her visa request here in Hong Kong. I can assure you, however, that my colleagues in the ODP program will afford her the utmost courtesy consistent will U.S. law. I hope that you and Hoa will soon be reunited in the United States.

Sincerely,

Matthew Victor
Refugee Officer

cc: JVA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

AFFIDAVIT OF SHEPARD C. LOWMAN

District of Columbia:

Shepard C. Lowman, being duly sworn, deposes and says:

1. My name is Shepard C. Lowman. I reside at 3101 Chichester Lane in Fairfax, Virginia.

2. Much of my professional life has been devoted to Vietnam and the plight of the Vietnamese boat people. From 1957 to 1988, I was a career Foreign Service Officer in the Department of State. From February 1966 to June 1970, 1 served in Vietnam on loan to the Agency for International Development. From February to June 1973 and again from July 1974 to April 1975, I served as a Political Officer in the U.S. Embassy in Saigon.

3. From late 1975 to early 1982, I was assigned to the Bureau for Refugee Programs and placed in charge of the implementation of the Department's Indochinese Refugee Program. During the latter part of this period,

I carried the title of Deputy Assistant Secretary of State. From June 1986 to January 1988, I was Director of the Office of Vietnam, Laos and Cambodia Affairs in the Bureau of East Asia and Pacific. I retired from the Department in 1988 with the grade of Minister Counselor in the Senior Foreign Service.

4. Following my retirement, I served for about one year as the President and Executive Director of Refugees International where I continued to be actively involved in Indochinese refugee affairs, attending the International Conference on Indochinese Refugees in Geneva in June 1989. In 1991, I joined the Migration and Refugee Services of the United States Catholic Conference (MRS/USCC), where I am now serving as Director of International Refugee and Immigration Affairs. In my work with MRS/USCC, I have continued to be engaged in matters concerning Southeast Asian refugees.

5. With the fall of Saigon to North Vietnamese forces in April 1975, an historic migration of refugees out of Indochina began. The first wave of these, some 130,000 refugees, immediately preceded or accompanied the fall of Saigon. In May 1976, the Attorney General approved a small program enabling the admission to the United States of an additional 11,000 Vietnamese refugees. For a brief period, it was thought that this group represented the final exodus of refugees from Vietnam, but as communist rule tightened and hundreds of thousands were imprisoned or forcibly relocated to barren new economic zones, the pressure to leave grew and a steady flow of boat people developed. To accommodate this flow, the Department approved a new admission program for 14,000 refugees in August 1977, which was followed by yet another new admission program in early 1978.

6. The Vietnamese invasion of Cambodia in December 1978 and the Sino-Vietnamese border conflict immediately thereafter heightened tensions in the region and led the Hanoi regime to commence a deliberate campaign of expulsion of its Chinese population. Some 250,000 Vietnamese of ethnic Chinese origin fled Vietnam to China and hundreds of thousands more left Vietnam by boat to Hong Kong and Southeast Asia. Fearing that they would be left to absorb a permanent population of Vietnamese refugees, Malaysia and Thailand began forcing boats back to sea and countless thousands lost their lives. In response to this crisis, the Secretary General convened and the United Nations High Commissioner for Refugees chaired the first International Conference on Indochinese Refugees in Geneva in June 1979. The agreement that was reached at this conference brought the crisis largely under control for the next several years. As part of the solution, all of those fleeing communist rule in Indochina were accorded presumptive refugee status. The regional states agreed that they would not refuse first asylum to these refugees and the resettlement states agreed to a dramatic increase in their admissions quota. The United States alone admitted almost 14,000 Vietnamese refugees per month for the next two years and significant numbers thereafter.

7. During the period from 1979 to 1989, if a refugee applicant from Vietnam were qualified as an immigrant, the Department of State would admit such applicant as an immigrant in order to make available refugee admissions stretch further to meet the need. Thus, the Department regularly processed current visa petitions for persons fleeing communist rule in Indochina, despite the fact that such persons were regarded as illegal aliens by many of the countries of Southeast Asia. It is my understanding that this practice continued until

agreement was reached on the Comprehensive Plan of Action ("CPA") in June 1989 and, at least in the case of Hong Kong, until September 1993, for the beneficiaries of current immigrant visa petitions.

8. As time passed, resistance to an indefinite continuation of the Indochinese Refugee Program began to develop among many of the concerned first asylum and resettlement states. This resistance was heightened by the perception that growing number of these asylum seekers were not qualified as refugees under the 1951 Geneva Convention Relating to the Status of Refugees.

9. 1n 1987 and 1988, a new wave of tens of thousands of boat people fled Vietnam, resulting in pushbacks by Thai and Indonesian marine police and threatening the fragile consensus that had been reached ten years before. Responding to a massive increase in new arrivals, the Hong Kong Government announced that as of June 15, 1988, it was revoking the boat people's presumptive refugee status, and that, henceforth, all newly arriving boat people would be treated as illegal aliens. These illegal aliens would be detained and screened by local immigration authorities to determine whether they qualified for refugee status on a case by case basis. Following the Hong Kong precedent, the first asylum states in Southeast Asia and the resettlement countries agreed to implement a procedure of individualized adjudications for all Vietnamese boat people arriving after an agreed upon cut-off date in March 1989.

10. At an International Conference on Indochinese Refugees held in Geneva in June 1989, this arrangement was memorialized by participating states in the form of an informal agreement known as the Comprehensive Plan of Action ("CPA"). While the plan of action embodied in the CPA has guided U.S. policy with respect to the resettlement of the Vietnamese boat people since

June 1989, it has no formal status in U.S. law, having never been submitted to the U.S. Senate for confirmation nor made the subject of an Executive Order.

11. Under the terms of the CPA, if the immigration authorities of a first asylum state determine that a Vietnamese applicant is qualified for refugee status under the Geneva Convention, the United States is committed to work with other resettlement countries to assure their resettlement. However, under the Immigration and Nationality Act, as amended by the Refugee Act of 1980, such persons may not be admitted by the United States as refugees unless they are first interviewed and found qualified for such status by United States immigration officials. On the other hand, no such interview by INS officers can take place until the applicant has been found qualified for refugee status by host country immigration officials. Thus, the United States, under the CPA, has forfeited its right to resettle as refugees, persons regarded as refugees by the INS, but not so regarded by immigration officials in first asylum countries.

12. The CPA provides that "Persons determined not to be refugees should return to their country of origin in accordance with international practices reflecting the responsibilities of States towards their own citizens. In the first instance every effort will be made to encourage the voluntary return of such persons." This section of the Agreement creates an implied commitment that countries of origin will receive back their citizens and that countries of resettlement will not resettle *as refugees* persons determined not to qualify for such status by host country immigration officials.

13. The CPA does not provide specifically for the return of those persons determined not to be refugees, but who do not choose to return voluntarily. It does state, however, that "If, after the passage of reasonable

time, it becomes clear that voluntary repatriation is not making sufficient progress towards the desired objective, alternatives recognized as being acceptable under international practices would be examined." While the CPA does not define such acceptable international practices, the phrase has been widely interpreted by states as including, under certain circumstances, the possibility of the forcible return of asylum seekers found not to be refugees. As time has passed, some first asylum states have become impatient with the progress of voluntary repatriation and significant pressure has developed for a policy of forcible return.

14. In the case of Hong Kong, the implementation of the screening policy together with a harsh new detention policy initially did little to stem the flow of newly arriving boat people. Between June 15, 1988 and the end of 1989, over 44, 000 Vietnamese asylum seekers arrived in Hong Kong. Asylum seekers and others who arrived later have been forced to endure deplorable conditions of detention since the formation of the closed camp system in 1988. Rather than being operated as normal refugee camps, the Hong Kong camps have operated as large prison-like detention centers. These detention centers have been plagued by intense overcrowding and United Nations standards for per capita space have been routinely violated. Most of Hong Kong's camps are covered with concrete and surrounded by high chain link fences topped by rolls of barbed concertina wire. Children who have grown up in the camps have been completely isolated from the outside world. The failure to give adequate authority to leaders in the refugee community has lead to a breakdown in law and order in which rape, robbery, extortion and intimidation have become routine. Observers believe that many asylum seekers have returned home to Vietnam voluntarily simply because they have feared for the safety of their

families in the camps. The Government of Hong Kong has earned serious condemnation for its management of these camps.

15. Having had little, if any, success in stemming the tide of new arrivals, the Hong Kong Government moved to implement a policy of forcible return beginning in December 1989. Since that time, this policy has consisted of the intermittent use of deportation of small groups in order to maximize the pressure on others to repatriate voluntarily. Thus, any person who has been determined not to be a refugee in Hong Kong is subject to the possibility of a forcible return to Vietnam and to date approximately 300 Vietnamese boat people have been forcibly returned. Eventually, the Hong Kong screening, detention, and forced repatriation policies succeeded in ending the flow of illegal emigration. In 1990, over six thousand boat people arrived in Hong Kong as compared with thirty four thousand the year before. In 1991, this number jumped again to twenty thousand but, since 1991, less than one hundred, Vietnamese boat people have fled to Hong Kong by boat. Nonetheless, as of this date, there are still more than 29,000 Vietnamese boat people detained in Hong Kong.

16. While the CPA explicitly calls for a return "to their country of origin" of those "determined not to be refugees," it sets forth that policy in the overall context of a quasi-judicial process of refugee status determination. The CPA does not speak to the processing of immigrant visa applicants or the holders of other migration documents such as humanitarian parole or non-immigrant visas issued on grounds not related to refugee status. There was, to my knowledge, no discussion of this issue in the negotiation of the CPA and it is not treated in any of the documents related to the International Conference on Indochinese Refugees. Accordingly, if a

nation wishes to issue a visa on other than refugee status grounds and the first asylum nation agrees to the departure of the person in question on the basis of such a document, it would be an event outside of the jurisdiction or scope of the CPA.

17. In fact, such events have occurred regularly in Hong Kong. Prior to the adoption of the CPA, I was assured by Hong Kong officials that if the United States wished to accept persons for family reunification reasons, such wishes could be accommodated. These assurances have been realized through the establishment of a family reunification track which runs parallel with the refugee status adjudication track.

18. I am informed by competent observers of the Hong Kong refugee situation that the Hong Kong Immigration Department has followed a practice whereby, once it is understood that an applicant qualifies for resettlement to the United States on the basis of immigration criteria, such applicant is rejected for refugee status by both the original examining officer and by the Hong Kong Refugee Status Review Board ("RSRB"). The purpose of this practice is to avoid spending the time of Hong Kong officials on such cases since they are permitted to depart Hong Kong in any event as immigrants pursuant to section 13D(2) of the Hong Kong Immigration Ordinance, which provides as follows:

> Every person detained under this section shall be permitted all reasonable facilities to enable him to obtain any authorization required for entry to another state or territory or, whether or not he has obtained such authorization, to leave Hong Kong

19. Until recently, the Department of State implemented this family reunion track. Hong Kong Immigration automatically approved for family reunion close

relatives (defined as spouses and unmarried children under the age of twenty-one) of refugees already accepted for U.S. resettlement on a "following to join" basis. Most such cases were accepted by INS as refugees. In addition, the Department processed the applications and issued immigrant visas to asylum seekers who were the beneficiaries of current immigrant visa petitions. Neither the Hong Kong Immigration Department nor the United Nations High Commissioner for Refugees voiced any objections to this procedure and immigrant visas were regularly processed until approximately September 1993 without incident.

20. In short, until approximately September 1993, if a Vietnamese asylum seeker in Hong Kong was the beneficiary of a current immigrant visa petition, such petition would be processed by the U.S. Consulate General in Hong Kong, regardless of whether such asylum seeker had been recognized as a refugee by the Hong Kong Immigration Department. If, following such processing, the applicant was issued an immigrant visa, the Hong Kong Government allowed the beneficiary of that petition to depart for the United States either on the basis of its family reunion program or in accordance with section 13D(2).

21. In or around September 1993, however, the Department of State abruptly, and without warning, changed its practice under more than four years of the CPA of processing current immigrant visa applications of Vietnamese boat people in Hong Kong. On September 24, 1993, the U.S. Consulate General in Hong Kong notified the Hong Kong Immigration Department of this change in U. S. policy, stating that:

> We have received clear instructions from the Department of State in Washington, D.C., that we are only authorized to process the immigrant visa cases

> of persons recognized as refugees. We may not process the immigrant visa request of anyone awaiting a screening decision. We also may not process the case of anyone screened-out as a refugee. This stipulation holds regardless of whether the person in question is a beneficiary of a current U.S. visa petition. The U.S. government will not as a rule resettle screened-out asylum seekers and will as a rule not invoke Section 13(d)(2) of Hong Kong law. (Exhibit A)

On December 22, 1993, the Consulate General wrote to the Chairman of Hong Kong's Refugee Status Review Board clarifying the U.S. policy not to resettle persons not recognized as refugees. (Exhibit B)

22. In accordance with this change in policy, the U.S. Consulate General began sending letters to the beneficiaries of current immigrant visa petitions in Hong Kong, notifying them that their petition is now current but that it cannot be processed in Hong Kong. These letters state, in part, that:

> The U.S. government supports the Comprehensive Plan of Action (CPA) governing the screening of asylum seekers in Hong Kong. Under the CPA, those not recognized as refugees as defined by international criteria must return to Vietnam to pursue resettlement in a third country. You have not been granted refugee status. Since you have been screened out, you must therefore return to Vietnam.
>
> However, because you are the beneficiary of a current U.S. immigrant petition, you are eligible for an immigrant visa interview when you return to Vietnam.

Samples of such lettere are attached as Exhibit C.

23. I am aware of over 90 Vietnamese asylum seekers now in Hong Kong who are the beneficiaries of current immigrant visa petitions and believe the number is likely to be a good deal larger and certain to grow over time. The Department's decision to refuse processing of these Vietnamese nationals in Hong Kong is extremely detrimental to their interests. After enduring a dangerous flight by boat and years of extreme hardship in overcrowded and dangerous detention facilities, these persons are now told they must return to the land from which they fled, before they can join their loved ones in the United States. The great majority of the boat people cut their ties with home before they left. Jobs and property were abandoned. In some cases, no family was left behind. In others, family members in Vietnam will be unable or unwilling to support the returnees. Many fear that their lives and freedom will be threatened in Vietnam. In view of the serious flaws in the Hong Kong government's screening process and its practice of automatically denying the refugee claims of applicants when it is informed by the U.S. Consulate that they are eligible to immigrate to the United States, this fear will sometimes be well-founded. Finally, experience has demonstrated that it can take years to persuade many boat people to return to Vietnam and that a significant number of others will not go back unless forced.

24. For those immigrant visa beneficiaries who do return to Vietnam and wish to apply for resettlement through the Orderly Departure Program ("ODP"), many are likely to experience significant difficulties. This program permits immigrant visa beneficiaries to register for interviews in Ho Chi Minh City and, if approved, to depart to join their families in the United States. However, there is no guarantee that the Government of the Socialist Republic of Vietnam will, in fact, issue an exit permit to the immigrant visa beneficiary and no interview with INS will take place until such an exit permit has been issued. In the case of those who married in Hong Kong, the acquisition of such an exit permit may prove impossible as the Hanoi regime does not recognize overseas marriages.

25. Even if successful, the effort to obtain an exit permit is a difficult one and the bureaucratic hurdles are formidable, time-consuming and often expensive. Assuming that an exit permit is finally obtained, the ODP process itself is lengthy and the immigrant visa beneficiary could expect to wait many months more before actually leaving Vietnam to join his or her family.

26. During all of this time, the applicant will need to find some way to survive economically, while enduring the stress of an uncertain future and a generally hostile and discriminatory environment for returnees with family abroad. Thus, a requirement that an applicant return home and pursue in Vietnam his or her rights as a current immigrant visa beneficiary poses real hardship in every case and, in others, may result in persecution or denial of the right to reunite with one's family.

_____

Shepard C. Lowman

Sworn to me this 24th
day of February, 1994

_____

JUANITA STEVENSON
Notary Public, District of Columbia
My Commission Expires September 14, 1995

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

HONG KONG

September 24, 1993

MR. K. M. YIM
Principal Immigration Officer
Hong Kong Immigration Department (HKID)
Vietnames Refugee Section
New Kowloon Plaza
Room 1122 F, 11/F
38 Tai Kok Tsui Road
Kowloon, Hong Kong

Dear Mr. Yim

I am writing in order to clarify U.S. policy towards resettlement of asylum seekers and the use of Section 13(d)(2) of Hong Kong law.

As a signatory to the 1989 Comprehensive Plan of Action (CPA), the United States agreed to the principle that persons not recognized as refugees in first asylum countries should not be resettled in third countries. However, in the past, the U.S. government on occasion invoked Section 13(d)(2) to process the immigrant visa case of someone who was the beneficiary of a current U.S. immigrant visa petition, despite the fact that he/she was denied refugee status in Hong Kong.

We have received clear instructions from the Department of State in Washington, DC, that we are only authorized to process the immigrant visa cases of persons recognized as refugees. We may not process the immigrant visa request of anyone awaiting a screening

decision. We also may not process the case of anyone screened-out as a refugee. This stipulation holds regardless of whether the person in question is a beneficiary of a current U.S. visa petition. The U.S. government will not as a rule resettle screened-out asylum seekers and will as a rule not invoke Section 13(d)(2) of Hong Kong law.

The use of 13(d)(2) will be limited in the future to those persons recommended for resettlement in the United States by the US Committee For Vulnerable Persons.

I hope this information is of use.

Sincerely,

Matthew C. Victor
Refugee Officer

cc: Mr. Brian Bresnihan, Refugee Coordinator
Mr. C.M. Lo, Director
Mr. Blackwell, Chairman

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

HONG KONG

December 22, 1993

MR. F. M. Blackwell
Chairman
Refugee Status Review Board
Room 905, Tsia Sha Tsui Centre
66 Mody Road
Kowloon, Hong Kong

Dear Mr. Blackwell,

Recently this office began responding to referrrals from the Vietnamese Vetting Section of Hong Kong Immigration in cases involving screened out asylum seekers (in the first and/or second instance) with the following statement:

The U.S., as a signatory to the 1989 Comprehensive Plan of Action (CPA), will not resettle persons not recognized as refugees. This stipulation holds regardless of whether the person in question is a beneficiary of a current U.S. visa petition.

This statement is no way intended to indicate a reluctance on the part of the United States Government to resettle those persons granted refugee status by the Hong Kong Immigration Department or the Refugee Status Review Board, or receiving UNHCR mandate. In fact, a person who is a beneficiary of a current U.S. visa petition and has been recognized as a refugee may pursue their immigrant visa request here in Hong Kong.

I hope this information is of use.

Sincerely,

Matthew Victor
Refugee Officer

cc: JVA

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

HONG KONG

December 16, 1993

MR. Tran Quoc Toan
1211 Oakland Street
Fort Wayne, IN 46808

RE: Tran Quoc Thai VRD 45/1/91

Dear Mr. Toan:

I am writing in response to your recent letter concrning the status of your brother, Mr. Tran Quoc Thai. According to our records, you filed an F-4 family preference visa petition on his behalf on June 16, 1982. The F-4 visa petition for Thai is now current, which means the immigrant visa case can be processed.

The U.S. government supports the Comprehensive Plan of Action (CPA) governing the screening of asylum seekers in Hong Kong. Under the CPA, those not recognized as refugees as defined by international criteria must return to Vietnam to pursue resettlement in a third country. Tran Quoc Thai has not been granted refugee status. Since he has been screened out, he must therefore return to Vietnam.

However, since Thai is the beneficiary of a current immigrant visa petition, he is eligible to apply for a U.S. immigrant visa once he returns to Vietnam. He may process his immigrant visa application through the Orderly Departure Program (ODF) which operates through the U.S. Embassy in Bangkok. After Thai

departs Hong Kong, we will transfer his file to ODP. For more information on the ODP program, you may contact the ODP office. Their address is:

ORDERLY DEPARTURE PROGRAM
9th Floor Pajabhum Building
127 South Sathorn Tai Road
Bangkok 10120 Thailand

I am sorry that I cannot assist Tran Quoc Thai to pursue his visa request here in Hong Kong. I can assure you, however, that my colleagues in the ODP program will afford his visa application the utmost courtesy consistent with U.S. law. Yesterday I met with Thai in the detention center where he is being held and discussed his case in great detail. During that meeting I urged him to consider volunteering to return to Vietnam in order to pursue his immigrant visa request through the U.S. ODP program.

I know this is difficult news to hear, but I hope it is helpful to you in advising your brother. I hope that you and Thai will soon be reunited in the United States.

Sincerely,

Matthew Victor
Refugee Officer

cc: JVA

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

HONG KONG

December 30, 1993

Ms. Pam Baker
Knight & Ho, Solicitors & Notaries
Rooms 1001-7, 1009, 906 & 909
Ritz Building
625 Nathan Road
Kowloon, Hong Kong

Dear Pam:

I am responding to your December 29 letter concerning the immigrant visa case of Vu Thi Hoa, VRD 234/91.

The decision to recognize whether or not a person is a refugee as defined by internationally accepted criteria is guided by the Comprehensive Plan of Action (CPA). After interviewing Ms. Hoa, the Hong Kong Immigration Department (HKID) determined that she was not a refugee. She appealed this decision to the Refugee Status Review Board, which affirmed the HKID decision.

The US Government supports the CPA. The screening process in Hong Hong is part of the CPA. Under the CPA, those who are screened out will not be resettled. The only option for the screened out is to return to Vietnam.

According to our records, the (IR-1) visa petition for Vu Thi Hoa is now current, which means the immigrant

visa case can be processed. However, unless a person has been screened in as a refugee, the individual must return to Vietnam to have the immigrant visa case processed by the Orderly Departure Program (ODP). Since Ms. Hoa has been screened out, she must therefore return to Vietnam to have her case processed.

The UNHCR sponsors a voluntary repatriatin program for those who believe their best option is to return to Vietnam. I suggest that Ms. Hoa talk with a UNHCR field officer and apply for the voluntary repatriation program as soon as possible, in order to be reunited with her husband.

Sincerely,

_____

Matthew Victor
Refugee Officer

cc: JVA

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

HONG KONG

January 4, 1994

Lam Ky
VRD 800/23/89
Tai A Chau Detention Centre
Hong Kong

Dear Ms. Ky:

I am writing in connection with your immigrant visa request. According to our records, Tai Lam filed a I-R1 family preference visa petition on your behalf on December 2, 1992. Your I-R1 visa petition is now current, which means the immigrant visa case can be processed.

The U.S. government supports the Comprehensive Plan of Action (CPA) governing the screening of asylum seekers in Hong Kong. Under the CPA, those not recognized as refugees as defined by international criteria must return to Vietnam to pursue resettlement in a third country. You have not been granted refugee status. Since you have been screened out, you must therefore return to Vietnam.

However, because you are the beneficiary of a current U.S. immigrant petition, you are eligible for an immigrant visa interview when you return to Vietnam. You may pursue your immigrant visa application through the Orderly Departure Program (ODF) which operates through the U.S. Embassy in Bangkok. After you depart Hong Kong, we will transfer your file to ODP.

For more information on the ODP program, you may contact the ODP office. Their address is:

ORDERLY DEPARTURE PROGRAM
9th Floor Pajabhum Building
127 South Sathorn Tai Road
Bangkok 10120 Thailand

I am sorry that I cannot assist you to pursue your visa request here in Hong Kong. I can assure you, however, that my colleagues in the ODP program will afford you the utmost courtesy consistent with U.S. law. I hope that you and Tai Lam will soon be reunited in the United States.

Sincerely,

Matthew Victor
Refugee Officer

cc: JVA

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

HONG KONG

January 5, 1994

Nguyen Thi Anh
VRD 754/4/89
High Island Detention Centre
Hong Kong

Dear Ms. Anh:

I am writing in connection with your immigrant visa request. According to our records, Phan Minh Mei filed a I-R1 family preference visa petition on your behalf on December 17, 1992. Your I-R1 visa petition is now current, which means the immigrant visa case can be processed.

The U.S. government supports the Comprehensive Plan of Action (CPA) governing the screening of asylum seekers in Hong Kong. Under the CPA, those not recognized as refugees as defined by international criteria must return to Vietnam to pursue resettlement in a third country. You have not been granted refugee status. Since you have been screened out, he must therefore return to Vietnam.

However, because you are the beneficiary of a current U.S. immigrant petition, you are eligible for a immigrant visa interview when you return to Vietnam. You may pursue your immigrant visa application through the Orderly Departure Program (ODP) which operates through the U.S. Embassy in Bangkok. After you depart Hong Kong, we will transfer your file to ODP.

For more informatin on the ODP program, you may contact the ODP office. Their address is:

ORDERLY DEPARTURE PROGRAM
9th Floor Pajabhum Building
127 South Sathorn Tai Road
Bangkok 10120 Thailand

I am sorry that I cannot assist you to pursue your visa request here in Hong Kong. I can assure you, however, that my colleagues in the ODP program will afford you the utmost courtesy consistent with U.S. law. I hope that you and Pham Minh Hai will soon be reunited in the United States.

Sincerely,

Matthew Victor
Refugee Officer

cc: JVA

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

HONG KONG

January 5, 1994

Mr. Pham Minh Hai
95 Belvista Dr
Rochester, NY 14625

RE: Nguyen Thi Anh VRD 754/4/89

Dear Mr. Hai:

I am writing in connection with the immigrant visa request of your wife, Nguyen Thi Anh. According to our records, you filed an I-R1 family preference visa petition on Anh's behalf on December 17, 1992. The IR-1 visa petition for Anh is now current, which means the immigrant visa case can be processed.

The U.S. government supports the Comprehensive Plan of Action (CPA) governing the screening of asylum seekers in Hong Kong. Under the CPA, those not recognized as refugees as defined by international criteria must return to Vietnam to pursue resettlement in a third country. Nguyen Thi Anh has not been granted refugee status. Since she has been screened out, she must therefore return to Vietnam.

However, since Nguyen Thi Anh is the beneficiary of a current immigrant visa petition, she is eligible to apply for a U.S. immigrant visa when she returns to Vietnam. She may process her immigrant visa application through the Orderly Departure Program (ODF) which operates through the U.S. Embassy in Bangkok. After Anh departs Hong Kong, we will transfer her file to ODP. For more information on the ODP program, you may contact the ODP office. Their address is:

ORDERLY DEPARTURE PROGRAM
9th Floor Panjabhum Building
127 South Sathorn Tai Road
Bangkok 10120 Thailand

I am sorry that I cannot assist Nguyen Thi Anh to pursue her visa request here in Hong Kong. I can assure you, however, that my colleagues in the ODP program will afford her the utmost courtesy consistent with U.S. law.

Sincerely,

Matthew Victor
Refugee Officer

cc: JVA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 94-0361 (SSH)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

SUPPLEMENTAL AFFIDAVIT OF DANIEL WOLF

District of Columbia:

Daniel Wolf, being duly sworn, deposes and says:

1. My name is Daniel Wolf. I am attorney of record for Plaintiffs in this action and am submitting this affidavit in connection with Plaintiffs' application for a temporary restraining order.

2. On February 25, 1994, this action was filed following four weeks of fruitless discussions between myself and my co-counsel, Robert B. Jobe, representing the Plaintiffs, and various officials of the Department of State. In virtually everyone of these discussions, Mr. Jobe and I emphasized the importance of the Department taking immediate action to reverse its illegal practice of refusing to process the current immigrant visa petitions of Vietnamese nationals detained in Hong Kong. We stated that immediate action was essential because our clients were: (1) at risk of being forcibly repatriated to Vietnam or of voluntarily repatriating

because they had been erroneously informed that the Department could not process their visa applications in Hong Kong; and (2) needlessly languishing in detention under deplorable and dangerous conditions because the Department had refused to process their visas.

3. Our discussions with the Department commenced on January 28, 1994, when Mr. Jobe and I telephoned Diane Dillard, Deputy Assistant Secretary for Consular Affairs, and raised with her the U.S. Consulate General's practice of refusing to process the current immigrant visa petitions of Vietnamese nationals detained in Hong Kong and Southeast Asia. We further informed Ms. Dillard that in our view this practice violated the Immigration and Nationality Act and the controlling regulations, and that it was our intent to file an action in U.S. District Court seeking to compel the Department to comply with the law. Ms. Dillard responded that she was aware of the Department's practice and would act promptly to review it. She then requested that we provide her the names of individuals whose visas had been processed in Hong Kong prior to the decision to reverse the Department's practice in approximately September 1993. We informed Ms. Dillard that we would attempt to gather a list of such individuals, but that there were hundreds of them and she could easily ascertain their names by contacting the Post in Hong Kong.

4. On February 2, 1994, we telephoned Ms. Dillard again to inquire about the results of her review. Ms. Dillard informed us that she had been waiting for us to provide her a list of names, despite the fact that those names were readily available to her through official channels had she chosen to use them. We then gave Ms. Dillard a list of several Vietnamese nationals whose immigrant visas had been processed at the U.S.

Consulate in Hong Kong and urged her to take swift action to reverse the Department's policy. After our conversation, we sent Ms. Dillard a copy of a letter dated September 24, 1993 from Matthew Victor, Refugee Officer for the U.S. Consulate in Hong Kong, to K.H. Yim, Principal Immigration Officer of the Hong Kong Immigration Department, informing Mr. Yim that henceforth the U.S. Consulate would "not process the immigrant visa request of anyone awaiting a screening decision [or] screened-out as a refugee." (Exhibit A.)

5. On February 4, I telephoned Ms. Dillard again. Ms. Dillard informed me that the information that we had provided her two days before had been helpful, particularly the letter from Mr. Victor to Mr. Yim. She further informed me that she saw no justification for the practice of refusing to process immigrant visas in Hong Kong and would recommend that the practice be reversed.

6. On February 8 or 9, Mr. Jobe and I telephoned Ms. Dillard again. During this conversation, Ms. Dillard assured us that the Department had sent guidance to the U.S. Consulate in Hong Kong instructing it to reverse its practice of refusing to process Vietnamese boat people in Hong Kong. Ms. Dillard further assured us that the U.S. Consulate would send letters to Vietnamese nationals who had been erroneously informed that they would have to return to Vietnam to have their cases processed that, in fact, their cases could be processed in Hong Kong. We agreed that this process should not take more than seven days.

7. On February 10, 1994, we sent (by facsimile transmission) a letter to Ms. Dillard proposing "a framework for resolving the problem which has developed in connection with the processing of immigrant visa petitions of Vietnamese boat people in Hong Kong and Southeast Asia." (Exhibit B.) The letter specifically stated that we

had "refrained from filing our complaint in U.S. District Court, because it is our impression that you are taking prompt action to reverse its existing practice." We emphasized the hardship that our clients were facing in detention and the risk of repatriation to Vietnam, "while the Department reconsiders its policy." The letter concluded:

> We have already twice delayed the decision to file our complaint. If it appears that a settlement along the terms we have suggested is reasonably within reach, we will again delay our February 11 target date for filing. However, we are not prepared to delay this filing indefinitely and will need to reach a final agreement in the very near future.

8. On approximately February 14, Mr. Jobe and I telephoned Ms. Dillard to follow-up on our letter of February 10. We asked Ms. Dillard whether she had raised this issue with the Department's attorneys and she confirmed that she had. I asked her whether we should contact Catherine Brown, Assistant Legal Adviser for Consular Affairs. Ms. Dillard stated that she was being advised by an attorney in the Department of Justice and that we should speak with him instead. She told us that she would call us the following day with his name and number. However, Ms. Dillard did not call with that information on February 15 or 16.

9. On February 16, Mr. Jobe and I telephoned Matthew Victor at the U.S. Consulate in Hong Kong. Mr. Victor informed us that, contrary to the information we had received from Ms. Dillard, the Department had not instructed the Post to reverse its practice of refusing to process immigrant visa applications of Vietnam detainees in Hong Kong.

10. On February 17, I telephoned Ms. Dillard and

informed her of Mr. Jobe's and my conversation with Mr. Victor. She informed me once again that the cable instructing the Post to change its practice would be sent out that day or the next day. During this conversation, Ms. Dillard also informed me that the attorney with whom she was consulting at the Department of Justice was Thomas Hussey of the Office of Immigration Litigation.

11. Immediately after my conversation with Ms. Dillard on February 17, Mr. Jobe and I telephoned Mr. Hussey to determine whether his client intended to resolve this matter without the need for litigation. Mr. Hussey informed us that the Department of State had made no decision to reverse its existing practice, but that it had the matter under review. He further informed us that the Department would complete its review in the normal course and that its timetable would not be dictated by a lawsuit or the threat of a lawsuit.

12. Based on our conversations with Mr. Victor and Mr. Hussey, we sent (by facsimile transmission) another letter to Ms. Dillard on February 17 "to ascertain whether it will be possible to reach an agreement with the Department concerning the reversal of the Department's practice of refusing to process the current immigrant visa petitions of Vietnamese nationals detained in Hong Kong and Southeast Asia." (Exhibit C) In this letter, we reviewed the events of the past three weeks and, "in view of the dire consequences that our clients experience with each day's delay," urged the Department to accept a proposed timetable for implementing each of the steps necessary to bring about a complete reversal of its illegal practice. Finally, we informed Ms. Dillard that we were available to meet with her to iron out the terms of an agreement, but that if no such agreement could be reached by February 22, "we will have no choice but to file an action in U.S. District Court."

13. On February 18, Mr. Jobe and I called Catherine Brown, Assistant Legal Adviser for Consular Affairs, to inform her of our intention of filing suit against the Department. Ms. Brown was not in the office, so we left a message with her colleague, James Hergen, asking that he inform her of the pending suit. On February 22, Ms. Brown called us and requested that we once again delay filing our complaint in order to give the Department further opportunity to review its policy. We stated that we were not inclined to forebear any longer, but that we would agree not to file on the condition that the Department give us certain assurances of prompt and enforceable action. At Ms. Brown's request, we agreed that we would sent her a copy of our draft complaint.

14. On February 23, I sent Ms. Brown a copy of our complaint. On the same day, she sent me a letter stating that "the Department has this matter under review and hopes to complete its review by the end of the week," but agreeing to none of the conditions that I had set forth in our February 22 conversation. (Exhibit D)

15. On February 24, Mr. Jobe and I sent (by facsimile transmission) a letter to Ms. Brown reviewing the events of the last four weeks. In this letter, we explained why we were unwilling to delay the filing of our complaint any longer as follows:

> [T]he Department has already been reviewing this matter for four weeks. Moreover, various officials within the Department have made contradictory remarks concerning the status and results of that review. Accordingly, we do not believe that it is in our clients' interests to await the outcome of the Department's deliberations, which based on our experience to date, we are not confident will be prompt or favorable.
>
> (Exhibit E).

16. On February 25, the day after it received an advance copy of our complaint, the Department of State cabled its Hong Kong and Southeast Asian consular posts asking that they take certain measures to preserve the status quo during the pendency of the Department's review of its policy with respect to processing immigrant visa petitions for screened-out Vietnamese asylum seekers. On February 25, the Department sent a second cable to its consular posts stating that they should initiate normal visa processing of such asylum seekers.

17. On February 25, Bernadette Sargeant of the U.S. Attorney's office telephoned me and informed me that the Department had cabled the posts with instructions relevant to this action. She stated that in her view these cables rendered our application for a temporary restraining order moot, but refused my suggestion that we file a consent order incorporating the relevant terms of the two cables and including more specific emergency relief on behalf of several members of the Detained Plaintiff class due to be forcibly repatriated on March 8. In view of Defendants' refusal to agree to a consent order, I sent (by facsimile transmission) a letter to Ms. Sargeant on February 28 enclosing a draft stipulation and offering "to withdraw our motion for a temporary restraining order on the condition that you agree to file an enforceable stipulation with the court." (Exhibit F) Defendants, however, have refused to sign any such stipulation.

18. At approximately 10:30 a.m. this morning, March 1, I received a facsimile transmission from John Bates, Chief, Civil Division, U.S. Attorney's Office (Exhibit G). Mr. Bates declined to enter into a stipulation. He offered to represent that the Department would not countermand the instructions contained in the two cables mentioned above without 48 hours notice pending briefing of the preliminary injunction motion, if we agree to combine the preliminary injunction hearing with the hearing on the merits and to an expedited briefing schedule (to be completed by March 22). He did not address the question of the members of the Detained Plaintiff class who face forcible repatriation to Vietnam on March 8. I then telephoned Ms. Sargeant and informed her that Mr. Bates proposal is not acceptable, but that in principle we had no objection to consolidating the preliminary injunction hearing with the merits.

_____

Daniel Wolf

Sworn to me this 1st
day of March, 1994

_____

Jenifer K. Price
My Commission Expires 10/31/95

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

AFFIDAVIT OF WAYNE S. LEININGER

1. I. Wayne S. Leininger, am Chief of the Consular Section at the American Consulate General in Hong Kong. In this capacity I supervise the operations of the immigrant visa unit and our refugee office. I am a named defendant in the above-captioned proceeding.

2. Pursuant to instructions from the Department of State (State 48852) received by me at opening of business February 28, I on that date instructed Refugee Office Matthew Victor to request the Hong Kong Government to make available for interview at the Consulate General immigrant visa applicants residing in the refugee camps when their cases progressed to that stage of processing. In reply, Mr. Brian Bresnihan, Refugee Coordinator for the Hong Kong Government, stated that, in keeping with HKG policy, an individual would be released from the camps for visa interview only upon assurance from the Consulate General that a visa would be issued and the person resettled in the United States. Mr. Bresnihan repeated this position to me in a subsequent meeting on March 1. On both occasions he was informed that it was impossible to provide advance guarantees of visa issuance, since this was a question that could only be answered definitively once the interview had taken place.

3. Previously, on February 25, in accord with instructions from the Department (State 46562), I had instructed Mr. Victor to convey the USG concern that no U.S. immigrant visa beneficiaries be among those scheduled for involuntary return to Vietnam under the Hong Kong Government's Orderly Return Program. Mr. Bresnihan replied that though there had been ten names for the March 8 flight on the long list from which ORP candidates were selected, only three (one of whom had a dependent child) were on the final roster. Absent a guarantee from the Consulate General that they would be issued visas or otherwise be resettled in the United States, Bresnihan continued, they could not be exempted. This was a position he was to repeat again to Mr. Victor on February 28, and to me in our March 1 meeting. Of those scheduled for the March flight, two (Pham Thi An Hong and Ho Thi Xuan) have pending visa applications with the Consulate General that are "current" (i.e., do not face a period of waiting before a priority date is reached); one (Huynh Thi Hong Hanh, with her child) is the beneficiary of a relative relationship petition filed by her legal permanent resident spouse, with a priority date that does not qualify her for further processing at this time.

4. On March 3, I learned via a faxed copy of a letter from Mr. Bresnihan to local attorney Pam Baker (representing the visa petition beneficiaries in question) that, in a reversal of Mr. Bresnihan's previously-expressed position, the Hong Kong Government would facilitate the appearance of the two "current" visa applicants at the Consulate General, were the Consulate General sim-

ply to confirm that an interview was scheduled. Ms. Baker promptly inquired of the Chief of the Visa Unit, Bernard Alter, as to what was required in order to have such an interview scheduled.

5. Mr. Alter advised Ms. Baker that, as in all immigrant visa cases, an interview could not be scheduled until and unless the applicant has in hand all the required personal and civil documents required for visa processing, and has so informed the Consulate General.

6. These documents are specified in a set of instructions ("Packet 3") provided to visa applicants as their cases achieve or approach "current" processing status. Pham Thi An Hong had been sent Packet 3 on May 10, 1993; Ho Thi Xuan on June 28, 1993. The Consulate General had no record of a positive response from either applicant. Ms. Baker stated that the applicants had already supplied certain of the required documents to the office of the Joint Voluntary Agency (JVA). Members of my staff have retrieved the JVA file for each applicant, reviewed the documents on file, and have advised Ms. Baker's office as to any deficiencies that have been noted. To the best of my knowledge, Ms. Baker is at this time assisting the applicants in completing their document portfolios. On Friday afternoon, March 4, a member of her staff confirmed that the applicants have or will before the interview have the required documents, and an appointment for interview has been scheduled for Monday morning, March 7.

7. No guarantees have been or can be made as to the issuance of the visas (neither to the Hong Kong Government nor to Ms. Baker) prior to the interview and formal evaluation of the supporting documents presented by the applicants. This has been explained to the Hong Kong Government, and to Ms. Baker.

8. On March 4, 1993, I contacted Mr. Bresnihan to determine whether the decision of the Hong Kong Government to facilitate the appearance of the two visa applicants in question constituted a one time exception to, or a reversal of, its previous policy of insistence upon a guarantee of resettlement from the concerned foreign consulate. Mr. Bresnihan confirmed that in the future, all visa applicants with scheduled visa interviews at the Consulate General will be permitted to appear for them and for their required medical examinations without any such prior assurances.

9. With respect to the list of ten cases brought to the Court's attention by plaintiff's counsel as scheduled for departure on the March 8 ORP flight, the attached chart is provided for the Court's information. It sets out, to the best of my knowledge, the current status of each of these individuals with respect to scheduled return to Vietnam and to U.S. immigrant visa processing.

10. I affirm under penalty of perjury that the above statements are true to the best of my knowledge and belief.

_____

Wayne S. Leininger

Sworn to me this 4th
day of March, 1994

_____

Donna J. Anderson, American Consul

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

AFFIDAVIT OF WAYNE S. LEININGER

1. I. Wayne S. Leininger, have been a Foreign Service Officer for over 22 years. I have spent nearly twelve years of that time serving overseas as a consular officer, including tours of duty in charge of the consular sections in Moscow, Tel Aviv, and, at the present time, at the U.S. Consulate General in Hong Kong. In this capacity I supervise a section comprising 13 American officers and 45 Foreign Service National Employees. Included in this number are Mr. Bernard Alter, Chief of the Visa Section, and Mr. Matthew Victor, Refugee Officer. I have complete access to the consular records of this post. I assumed my duties in Hong Kong in late July of 1993, after extensive consultations with my two immediate predecessors in this position, and with the Office of Chinese and Mongolian Affairs in the East Asian and Pacific Bureau of the Department of State. I am qualified to comment upon the immigrant visa policies and practices at the U.S. Consulate General in Hong Kong.

2. The screening of the claims to refugee status of Vietnamese boat people in Hong Kong under the

Comprehensive Plan of Action (CPA) is a three-tiered process. At first instance, the Hong Kong Immigration Department (HKID), applying the criteria of the Refugee Handbook of the U.N. High Commissioner for Refugees (UNHCR), makes a determination of refugee status. If the applicant is found not to be a refugee (i.e., is "screened-out"), he or she may appeal that finding to the Refugee Status Review Board (RSRB), an independent body made up of persons twenty percent of whom are local academics; thirty percent of whom are civil servants; and fifty percent of whom are lawyers not connected with the Hong Kong Government. If the applicant is denied refugee status on appeal, he or she still has recourse to request that the local UNHCR office exercise its mandate and in that way to become "screened-in". While the UNHCR does not become involved in the initial screening of refugees in Hong Kong (unlike its role in several other countries of first asylum in the region), it does actively monitor the outcome of cases as processed by HKID and RSRB, and it has not hesitated to use its mandate to assure that the final decisions are in accord with internationally-accepted standards. Ultimately, the same screening standards—UNHCR's standards—prevail in Hong Kong as elsewhere, regardless of the intervening screening steps.

3. The U.S. Immigration and Naturalization Service (INS) office in Hong Kong does not play a role in the screening process. It is, however, still the final arbiter, under U.S. law, of who actually is granted refugee status for the purpose of admission to the United States. It does generally accord great weight to the findings produced through the local screening procedure. It has been my observation that this from time to time is a factor that works in favor of the individual asylum-seeker. The director of the Hong Kong INS has in fact informed

me that his office commonly accords U.S. refugee status to cases screened in through the Hong Kong process that it would not have accepted were the individuals not to have been so recommended. Contrariwise, INS offices are not absolutely bound to accept a candidate screened-in under the CPA process. Some 95 individuals recommended for refugee status under the Hong Kong procedures are currently still in transit camps in the Philippines, having been rejected for admission to the United States by INS Manila (which has jurisdiction over the cases of those Vietnamese who were relocated out of Hong Kong to the Regional Processing Center there).

4. My understanding of the practice at the U.S. Consulate General in Hong Kong with respect to the processing of the immigrant visa applications of screened-out petition beneficiaries—based on a review of post files and consultations with my predecessors, before my arrival, and with colleagues on the scene, since—is as follows: Prior to 1989 and the advent of the CPA, such cases were not an issue, since there was no screening process and all arrivals from Vietnam were granted presumptive refugee status by the Hong Kong Government, and could be considered as candidates for resettlement by third countries. After the parties to the CPA in June of 1989 agreed to standards and a procedure that would distinguish refugees from non-refugees, the Department of State (hereinafter "the Department") in August of that year directed Hong Kong and other posts in first asylum countries to seek access to beneficiaries of current immigrant visa petitions, and to applicants seeking (pursuant to Section 207(c)(2) of the Immigration and Nationality Act, 8 USC 1157(c)(2), and 8 CFR 207.1(e)) to join spouses or parents previously admitted as refugees ("VISAS 93"

cases) before any final local screening as to refugee status was made (89 State 243430, Attachment 1). This was to avoid any conflict with CPA principles in dealing with cases that might have ended up screened-out. It was made clear in this message that any such special mechanisms put in place for these immigrant petition beneficiaries was to be considered to be of a temporary nature until the Orderly Departure Program (ODP) became a fully effective exit route for eligible immigrant cases.

5. In December of 1990, in light of what were then continuing uncertainties as to emigration out of Vietnam, the Department authorized the posts in the region for the first time to process the case of immigrant visa applicants who had formally been "screened-out". Still wary of a policy that would require applicants to return to Vietnam for processing, the Department nevertheless expressed recognition of the potential desirability of a regime under which all Vietnamese immigrant visas would be processed through ODP, and committed itself to periodic review of the matter (90 State 422906, Attachment 2).

6. In November of 1991 the Department took the next step in the evolution of its policy, and directed that posts in countries of first asylum accept for processing only the cases of immigrant visa applicants who had been screened-in under CPA criteria. Those who were screened out were to be advised to return to Vietnam and pursue their applications through ODP (91 State 383039, Attachment 3).

7. Notwithstanding these instructions, Consulate General records reveal that this post processed fourteen cases in this category (comprising twenty-three individuals) from the period from November, 1991, to April, 1993, or something less than one a month. Though thousands of Vietnamese left the camps in Hong Kong for

the United States during this period, the vast majority of them actually screened-in as refugees themselves; were qualified "VISAS 93" following-to-join applicants; or were screened-in refugees-cum-immigrants (that is, persons who could have qualified for refugee status, but who also qualified for and were issued immigrant visas pursuant to 8 CFR 207.1(d), in order to conserve the limited supply of refugee admission numbers).

8. To allow the processing of immigrant visas for those who were screened-out, the post, notwithstanding the principle that eligibility for a visa can only be determined after a personal interview and presentation of the personal and civil documents required by law, gave advance assurance of resettlement of these individuals to the Hong Kong Government, in satisfaction of the latter's then-precondition to the release of the applicants from the camps for those interviews. A copy of a typical exchange of letters between the Consulate General and the Hong Kong Government on such a case, involving clause 13(D)(2) of the Hong Kong Immigration Ordinance (which requires the Hong Kong Government to facilitate the efforts of a detainee to obtain departure documents to another country, and requires it to release such a person from custody for onward travel if s/he is successful), is attached this affidavit (Attachment 4). The expectation of resettlement politely expressed in the Hong Kong Government's letter is in fact its explicit reminder to the Consulate General of its policy during the period in question. Given the inappropriateness of granting advance assurance of resettlement in any instance, and especially in light of indications that marriage fraud is a growing phenomenon among those in the camps, this Consulate General is no longer able to provide such guarantees to the Hong Kong Government. Fortunately, in early March of 1994, the Hong

Kong Government's Refugee Coordinator informed me that such guarantees would no longer be demanded as a precondition to release of an individual for an immigrant visa medical examination or personal interview.

9. In April of 1993, after an exchange of cables in which this post argued that it should be permitted to continue making exceptions to the region-wide policy of not processing immigrant visa applications from the screened-out, the Department instructed the post to cease doing so (93 State 127427, Attachment 5). With the exception of two cases in process, in which visas were actually issued in May, and one final exception undertaken at explicit Department direction in November/December 1993, there have been no other immigrant visas issued to a screened-out immigrant visa applicant at this post since April of 1993.

10. I have read the affidavit of Shepard C. Lowman submitted to the court in support of the plaintiffs' filing in the above-captioned case. In paragraph 7 and elsewhere he alludes to a change of policy and practice at this post dating from September, 1993. As already described, the policy in question dates from November of 1991, and the post practice of making exceptions to that policy stopped for all practical purposes as of April, 1993. Two events of September 1993 could have created an impression that a change in the Consulate General's IV processing policy took place in September of 1993, however. First, we discovered several instances in which the relative relationships that ostensibly served as the basis for entitlement to refugee status as VISAS 93 following-to-join family members had in fact been formed subsequent to the principal refugee's entry to the United States, not prior to it, as the regulations require. We were obliged to terminate processing of those cases. Secondly, we found that we had to inform

several individual IV applicants who came forward seeking appointment interviews for immigrant visas that we could not—under the Department's April, 1993 instructions—continue the processing of their cases. By this means we discovered that there had been no proper general notification to this group of individuals of that fact, and so in September Mr. Matthew Victor, our refugee officer, began searching our data base of pending immigrant visa cases and informing in writing those who had been screened-out as refugees that we could not continue to process their applications.

11. At several points in the materials filed in support of plaintiffs' case reference is made to seeming contradictions between the message contained in Mr. Victor's letters announcing the cessation of processing and other letters bearing his name (or that of his predecessor) on the letterhead of the Joint Voluntary Agency (JVA), in which petitioners or beneficiaries were informed that a given case could and would be processed at this post. The Hong Kong JVA, which is affiliated with the Lutheran Immigrant Relief Service, is a private organization funded by the United States Government under a cooperative agreement to assist refugees in being resettled in the United States. It properly helps those screened-in as refugees to pursue immigrant visas if they are also entitled to immigrant status. I am aware of no authorization for JVA to continue to be involved in the immigrant visa applications of those who have been screened-out. Moreover, I am aware of no authorization given JVA at any time to sign letters on behalf of and using the name of an officer assigned to this Consulate General. Finally, all such letters giving assurance to the screened-out that their immigrant visa applications would be processed at this Consulate General that were dispatched subsequent to our April, 1993 guidance from

the Department were not in conformity with either the policy or practice of this post, said policy and practice of which JVA previously had been made aware.

12. Mr. Lowman in paragraph 18 of his affidavit and elsewhere asserts that the Hong Kong Government pursues a policy of routinely screening-out those asylum-seekers who become known to it as having U.S. relative relationships. To my knowledge, and as confirmed to me by the Hong Kong Government's Refugee Coordinator (Attachent 6), the Hong Kong Government has never had such a policy. Rather, during the period in which the Consulate General was under instructions to seek to process cases before refugee determinations were made (see paragraph 4), and in the interregnum in which the Consulate General was itself not in compliance with the Department's processing guidelines, HKID would, in such a circumstance, suspend the determination process. It did so since it had the Consulate General's assurance that the individual would otherwise be resettled, saw nothing to be gained by slowing down the individual's departure by persisting in what seemed to be an unnecessary screening decision, and—as Mr. Lowman correctly notes—preferred to devote its screening resources to cases that still required them. The HKID monitored the progress of these cases, and if for any reason such an individual whose screening was suspended did not acquire immigrant status, the screening procedure was resumed without prejudice. In point of fact, as compliance with CPA strictures with respect to the non-resettlement of the screened-out directly from countries of first asylum came to be regarded more seriously both by the Consulate General and by the Hong Kong Government, the HKID did, upon our advising it in several instances of existing U.S. relative relationships, reverse previous "screened-out" decisions to

"screened-in", solely to enable us to process the immigrant visa applications that were pending.

11. The "family reunification track" to which Mr. Lowman refers in paragraphs 17 and 19 does still exist. The Hong Kong Government has regarded and continues to regard spouses and minor children of those who have been resettled as refugees as refugees themselves—provided that the relative relationship existed prior to the principal refugee's resettlement. Similarly, Consulate General Hong Kong has facilitated and continues to facilitate the entry of such eligible applicants—those with pre-existing relative relationships—under the "VISAS 93" procedure, which implements Section 207(c)(2) of the Immigration and Nationality Act. The reason there has been a decline in the numbers of individuals resettled under this rubric is not due to any change of U.S. or Hong Kong Government policy, but rather to the fact that, over time, the bulk of the population in the camp eligible for the program has already been resettled. As noted previously, non-refugees in the camp whose relative relationship was established after the resettlement of the principal refugee in the United States are not and have never been eligible for this program.

12. It would perhaps be useful to place the numbers of people involved in this matter into some kind of perspective. I have already noted the number of cases (14) and people (23) who benefitted from the exceptions made in the past by this post to the policy regarding non-processing of the immigrant visa applications of the screened-out. From 1975 through January, 1994, the United States accepted for resettlement 54,338 Vietnamese refugees directly from the camps in Hong Kong, and another 16,030 from Hong Kong who traveled via the regional processing center in the Philippines.

Since the voluntary repatriation program was instituted—which embodies cash and other resettlement assistance provided by UNHCR—41,663 Vietnamese have voluntarily departed camps in Hong Kong for Vietnam (out of a worldwide total that approaches 60,000.) As of March 11, 1994, an additional 849 Vietnamese have been returned by the Hong Kong Government under its Orderly Return Program (involuntary repatriation). I am not aware of a single verified instance in which any of the returnees from Hong Kong have been subject to persecution in Vietnam.

13. I affirm under penalty of perjury that the above statements are true to the best of my knowledge and belief.

_____
Wayne S. Leininger

Subscribed and sworn to before me this 15th day of March, 1994

_____
Clyde L. Jones
Consul of the United States

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E.O. 12365: N/A
TAGS: PREF, CVIS, VM, HK
Subject: Vietnamese Boat person eligible for immigrant
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Visa
Ref: Hong Kong 17367 (NOTAL)

1. Department appreciates Post's thoughtful and thorough presentation, in REFTEL, regarding the case of a screened out Vietnamese boat person who subsequently married an American citizen and became the beneficiary of an IR-1 Immigrant Visa Petition. The essential question posed by Post is whether this visa case should be processed to completion in Hong Kong or sent back to Vietnam to be handled through the orderly departure program.

2. The relevant facts are as follows: A) this individual's case has been handled fully in compliance with the CPA and a final status determination has been made; (B) the marriage to an American citizen that made subject eligible to apply for an immigrant visa took place after her status determination; C) the INS approved an IR-1 petition based on that marriage; D) Post in REFTEL raised no questions regarding the bona fides of the marriage, and E) Post notes that under the Hong Kong government's regulations we can request subject for release from detention, for purposes of immigration.

3. As Post points out, we have processed immigrant cases out of the Hong Kong asylum seeking population when their potential immigrant status is discovered during screening. The only difference between those and the subject case is that subject became eligible for IV consideration after the screening had been completed.

4. The alterative to processing subject's immigrant visa application to conclusion in Hong Kong would be for UNHCR to counsel her to return voluntarily to Vietnam. If she agreed, file would then be transferred to ODP in Bangkok, subject would have to obtain Vietnamese exit permit, SRV would have to advise us she had exit permission, ODP would schedule her for interview in Ho Chi Minh City and, if approved she

would be manifested to depart and a few months later leave for the United States. This strikes Department as procedural overkill and not at all necessary to preserve the integrity of the CPA.

5. Post maintains in REFTEL paragraph five that processing subject's IV case in Hong Kong would contravene the CPA because subject has been determined to be a non-refugee. That would of course be true if we were proposing to resettle her as a refugee. However, she would be coming as an immigrant and, as Post reports in REFTEL, all major resettlement countries have made similar requests to release detainees for immigration.

6. As a general rule, if a Vietnamese boat person qualifies for U.S. immigration, and the first asylum country permits us to process the case, the U.S. does not want to use the CPA to block or delay immigrant visa processing. The uncertainties of emigration from Vietnam are still sufficient to make us wary of promoting a policy which would require return of currently eligible immigrants to that country for processing. Nevertheless, Department recognizes the potential desirability of a regime where all Vietnamese IV's would be processed through ODP, and we will keep the matter under periodic review.

7. As for Post's concerns that processing this case that the procedure of releasing asylum seekers from detention for the purpose of immigration is unique to Hong Kong and therefore will not create a precedent for other first asylum countries. Department doubts that American citizens in significant numbers would come to Hong Kong to marry boat people and then file immi-

grant visa petitions for them. As for those who do, each case should be considered on its merits for marriage bona fides, at both the petition approval and visa application stages. Cases involving fraudulent marriages should not be processed. But if the claimed relationship appears legitimate, Department sees no problem with post processing such cases to conclusion. It is also Department's understanding that it is the policy of Canada, and perhaps other countries, to process immigrant cases irrespective of screening decisions.

7. Post should request subject individual's release from detention and accept for processing her immigrant visa application. (RP/RAP/SEA:28161) Baker

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, ("LAVAS"), ET. AL., *PLAINTIFFS*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *DEFENDANTS*.

AFFIDAVIT OF MATTHEW C. VICTOR

1. I, Matthew C. Victor, am Refugee Officer at the American Consulate General in Hong Kong. I have held this position since June 28, 1993. In this capacity I manage the Department of State's refugee program in Hong Kong and monitor the work of the Joint Voluntary Agency for Refugees (JVA). In my day-to-day activities I report to Bernard Alter, Chief of the Visa Section. I am a named defendant in the above-captioned proceeding.

2. As this post's refugee officer I am tasked, among other duties, with monitoring living conditions for asylum seekers in Hong Kong. To this end, I meet frequently with Hong Kong Government, United Nations, and international organization officials to discuss the welfare of the camp population. Every two weeks I visit Hong Kong detention facilities, where I am able to observe up close the living conditions of camp residents.

3. The latest wave of Vietnamese boat people entering Hong Kong began in 1988. This influx peaked in 1989, when an average of close to 100 asylum seekers a day landed in Hong Kong. Local officials were at times in

the past hard pressed to accomodate all the new arrivals. Partly as a result, Hong Kong detention facilities gained a reputation for being overcrowded and crime-ridden prisons. In 1991 Hong Kong was housing well over 60,000 asylum seekers. As the number of arrivals began to decrease (12 in 1992) and people began to return voluntarily to Vietnam (12,612 in 1992 alone), however, the overcrowding problem began to improve dramatically. The latest figures show that Hong Kong houses 28,589 asylum seekers in facilities designed to accomodate 43,224.

4. As a result of the earlier international criticism, the Hong Kong government increased the numbers and training of security personnel, placed rival ethnic and social groups in separate detention facilities, improved social and medical facilities available to detainees, and began including camp leaders in decision-making wherever possible. In 1988 the government agreed to United Nations High Commissioner for Refugees (UNHCR) oversight of camp conditions. The UNHCR in Hong Kong has a full time protection officer whose sole duty is to monitor conditions in Hong Kong's Indochinese detention facilities. UNHCR does not publish a report or make public statements on conditions in camp. They do, however, provide periodic briefings to representatives of foreign countries on living conditions in detention. During my time as refugee officer, UNHCR has never indicated to me that they have major concerns about the living conditions faced by Vietnamese asylum seekers in Hong Kong. When I contacted the UN protection officer last week for an update, he indicated that this position has not changed.

5. The Hong Kong government has developed programs to improve medical, social, and educational facilities available to those in camp. Primary education is

guaranteed for all, something which is not the case in Vietnam. There are also many job training programs asylum seekers may participate in. The standard of medical care has been improved to such an extent that many local observers say that it is at least as good if not better then what is available to the average Hong Kong resident. Camp management organizes many social activities for camp residents.

6. The allegations made in the papers filed with the court that crime in the camps is rampant is no longer accurate. According to crime statistics for the years 1991, 1992, and 1993 for Whitehead Detention Centre, the largest of Hong Kong's detention camps, which contains more than 50% of the Indochinese asylum seekers here, the total number of crimes reported fell from 844 in 1991 to 588 in 1992 to only 130 last year in a population that remained at about the same level for all three years. Based on the 1992 figures, there was an average of 2,365 crimes reported per 100,000 people. In comparison, the United States experienced 5,660 crimes per 100,000 people in 1992. Whitehead's overall crime rate thus appears to be about 60% lower than the United States' rate. In fact, there was not one state in the Union that had a lower crime rate than Whitehead in 1992, according to the World Almanac (The World Almanac and Book of Facts 1994, Copyright Pharos Books, 1993, page 966).

7. Regarding the incidence of violent crime at Whitehead, there were four murder cases and two reports of rape in 1992. This amounts to 16.1 murders and 8 reported rapes per 100,000 persons. In comparison, the United States experienced 9.3 murders and 42.8 reported rapes per 100,000 persons in 1992. Although Whitehead's murder rate was higher than the total U.S. rate, it was on a par with Louisiana (16.9 in 1991, the

last year for which statewide totals are available) and Texas (15.3 in 1991). Washington DC's murder rate in 1991 was 80.6 per 100,000 persons. The incidence of rape (8 versus 42.8 per 100,000 persons in 1992) is considerably lower in Whitehead than in the United States, again according to the World Almanac.

8. Living conditions in detention are not ideal. Hong Kong government and UN officials attempt, however, to make a concerted effort to provide the basic necessities of life. Medical care and food are avaialble free of charge.

Educational and social activities are widely available. Crime in detention is low and continues to decline. The number of crimes reported in Whitehead dropped 78% in 1993 and also seems to be decreasing as a percentage of overall crime.

9. I affirm under penalty of perjury that the above statements are true to the best of my knowledge and belief.

_____

Matthew C. Victor

Sworn to me this 15th
day of March, 1994

_____

Clyde L. Jones, American Consul

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-0361(SSH)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

AFFIDAVIT OF BRUNSON MCKINLEY

1. I, Brunson McKinley, am a Deputy Assistant Secretary in the Bureau for Refugee Programs of the Department of State. Since 1971, I have been a career member of the U.S. Foreign Service. I have served in China, Vietnam, Europe and elsewhere. I have held my current position since October 1991. In July 1993, I assumed responsibility in the Bureau for Refugee Programs for policy questions relating to the Comprehensive Plan of Action for Indochinese Refugees (CPA). Since that time, I have been personally involved in all aspects of the U.S. government's CPA policy and its implications for U.S. foreign policy. The following information is based upon either personal knowledge or information provided to me in the course of my official duties.

2. The Comprehensive Plan of Action for Indochinese Refugees (CPA) was established by the international community in 1989 under the auspices of the United Nations High Commissioner for Refugees (UNHCR) in reaction to the continuing large outflow of boat people

from Vietnam and the consequent loss of life and growing reluctance of countries in the region to provide temporary safehaven—so-called "first asylum"—in countries of first arrival. Following the initial large-scale flight of Vietnamese in the wake of the fall of Saigon in 1975, there have been variable periods of high and low flows of boat people to first asylum countries in Southeast Asia and Hong Kong. In total, over almost 19 years, UNHCR estimates that 758,000 persons have arrived in countries of first asylum from Vietnam. Nobody knows how many people may have died en route. Some outflows—for example the 68,700 who fled to Hong Kong alone in 1979—were related to events in Vietnam (the Chinese invasion in early 1979). Numbers declined in the ensuing years, but by 1988 large numbers of Vietnamese were again arriving in the region's first asylum countries (18,000 arrivals in Hong Kong in 1988). In Thailand, boats were pushed off from shore and people drowned. It became clear that it would be necessary to deal with this long-standing problem in a manner that would both discourage further unsafe departures from Vietnam and provide secure first asylum.

3. The CPA constitutes an agreement among some 50 participating states including countries of first asylum, countries of origin (Cambodia and Laos in addition to Vietnam), countries of resettlement, and financial donor countries, coordinated by UNHCR. The CPA was devised as a comprehensive approach to addressing the Vietnamese boat people phenomenon. The intention of the framers was to establish a multilateral arrangement of burden sharing that would include commitments from all participating countries alike. The main components of the CPA were:

1) First asylum countries agreed to allow asylum seekers to land.

2) Cut-off dates would be established for automatic

eligibility for resettlement consideration (March 14, 1989, except that for Hong Kong the date is June 16, 1988).

3) A refugee status determination process (screening) was established in each first asylum country for those arriving after the cut-off dates. The governing standard for refugee status adopted was the refugee definition in the U.N. Convention and Protocol Relating to the Status of Refugees. Those who are determined to be refugees are eligible for resettlement in a third country; those determined not to be refugees would not be resettled, but would eventually have to return to Vietnam. The element of burden sharing is seen in the agreement of resettlement countries to resettle the pre-cut-off date population without screening, and to accept for resettlement those persons in the post-cut-off date population who are determined to be refugees through the screening process. It is also seen in the donor country commitment to fund daily sustenance of those in camps throughout this process.

4) The existing UNHCR Orderly Departure Program dating from 1979 for legal emigration from Vietnam (more below) was to be encouraged and promoted as the surest and safest way for bona fide refugees and qualified immigrants to depart Vietnam for resettlement abroad.

5) A voluntary return program was established to allow the screened out (and others who so chose) to return to Vietnam in conditions of safety and dignity with the assistance of UNHCR.

4. The declaration adopted at the conclusion of the CPA meeting in 1989 contains clear references to the procedures and rationale for the activities undertaken pursuant to the CPA. A complete copy of this document is attached; the following excerpts are of particular interest:

Clandestine Departures

—Extreme human suffering and hardship, often resulting in loss of lives, have accompanied organized clandestine departures. It is therefore imperative that humane measures be implemented to deter such departures, which should include the following:

Mass media activities . . . focusing on:

—The dangers and hardships involved in clandestine departures.

—The institution of a status-determination mechanism under which those determined not to be refugees shall have no opportunity for resettlement.

—Absence of any advantage, real or perceived, particularly in relation to third-country resettlement, of clandestine and unsafe departures.

—Encouragement of the use of regular departure and other migration programs.

—Discouragement of activities leading to clandestine departures.

Regular Departure Programs

—Emigration through regular departure procedures and migration programs should be accelerated and expanded with a view to making such programs the primary and eventually the sole modes of departure.

Resettlement

—Continued resettlement of Vietnamese refugees benefitting from temporary refuge in Southeast Asia is a vital component of the Comprehensive Plan of Action.

Repatriation

—Persons determined not to be refugees should return to their country of origin in accordance with international practices reflecting the responsibilities of States toward their own citizens. In the first instance, every effort will be made to encourage the voluntary return of such persons.

—If after the passage of a reasonable time, it becomes clear that voluntary repatriation is not making sufficient progress towards the desired objective, alternatives recognized as being acceptable under international practices would be examined.

5. The United States, in cooperation with other countries, decided to support the CPA from its inception in order to avoid a continuation of the tragedy of the boat people in Southeast Asia. First asylum countries in the region had been accepting asylum seekers from Vietnam for more than a decade after the fall of Saigon, but had begun to lose patience. In the absence of an international effort to stop the flow of boats from Vietnam, first asylum countries began to deal with the problem unilaterally, often resulting in loss of life. This, in turn, put them at odds with the United States and the rest of the international community. At the same time, the continuation of boat departures meant the continuation of death at sea, often at the hands of pirates.

6. Since 1989, the United States has been firm in its support of the CPA. The U.S. has provided more than $100 million in financial support through UNHCR. We have resettled in the U.S. 17,000 Vietnamese of the pre-cut-off camp population (35%) and 11,400 of the post-cut-off screened-in camp population (40%) directly from first asylum camps. In addition, the U.S. has maintained

diplomatic vigilance of others' adherence to the multilateral CPA agreement. U.S. refugee officers visit camps in the region and local communities in the United States with the message that the screened out will not be resettled and must return to Vietnam. We have also provided $3.5 million in support of U.S. non-governmental organization projects in Vietnam to assist in the reintegration of those who return.

7. The Steering Committee of the Comprehensive Plan of Action (under the chairmanship of UNHCR and made up of representatives of first asylum countries and the main resettlement countries) met in Geneva on February 14, 1994 to set the course for the completion of the CPA. The Committee noted that screening would be completed everywhere in the region in 1994 and that the vast majority of those who remained in the camps would be non-refugees. It was decided that every effort would be made to conclude the CPA by the end of 1995, including increased efforts to encourage voluntary repatriation of the screened out. The consensus statement issued by the Steering Committee also noted that, henceforth, new asylum seekers would continue to be treated in accordance with "internationally accepted practices," *i.e.*, the principle of non-refoulement, that is, non-return of a *bona fide* refugee to a country of feared persecution.

8. The United States supports the objective of ending the CPA by the end of 1995 by emphasis on voluntary repatriation. Further, the United States at the February 1994 Steering Committee meeting stated that it no longer objects in principle to the use of mandatory repatriation of those who would, in the end, refuse to return voluntarily. The United States noted, however, that, for the time being, mandatory return should not be extended beyond its present application—*i.e.*, that it should be limited to Hong Kong—in order to give volun-

tary repatriation every chance to work. The United States also stated that it would be prepared to review this issue at the end of 1994.

9. It is fundamentally important to the success of the CPA, and therefore to the Steering Committee and the United States, that Vietnamese in the camps have the clear perception that there is no alternative for the screened out but to return to Vietnam. In my judgment, anything that clouds that perception or gives birth to rumors that resettlement of the screened out is possible will reduce voluntary repatriation and create a situation in which resort to mandatory repatriation by first asylum governments is made more likely.

10. The CPA has been successful in creating an orderly process to receive and screen asylum seekers for refugee resettlement. Combined with an enhanced program for legal departures from Vietnam to countries of resettlement under the UNHCR Orderly Departure Program, this has resulted in a virtual end to boat departures and the saving of countless lives. The CPA's success has been possible in large measure because of virtually uniform adherence to the principle that those found to be refugees by the screening mechanisms established would be eligible for resettlement in third countries, while those found not to be refugees have no option but to return, ultimately, to Vietnam. United States practice with respect to the screened-out must be extremely sensitive to this policy, as any resettlement of the screened-out has the potential to seriously undermine the prospects for bringing this international program to a dignified and humane close.

11. Taking into account the CPA guidelines regarding respect for the family unit in refugee status determination, the United States has not objected to the screening

in of immediate family members of U.S. citizens and permanent residents even though these individuals may not themselves have a well-founded fear of persecution. The U.S. has, however, over time moved more and more toward drawing a line throughout the region at the resettlement as refugees from first asylum camps of anyone who has been screened out. It is my understanding that UNHCR and most first asylum governments in the region strongly believe that this line must be maintained.

12. The Department's recent decision to attempt to process the immigrant visa applications of the screened-out has elicited expressions of concern from UNHCR and first asylum countries that such a practice may provoke a reaction in the camps in Hong Kong and elsewhere in the region which could cripple the process of voluntary repatriation. First asylum government officials and UNHCR representatives, as well as officials from other resettlement countries, have indicated that taking even a limited number of screened out Vietnamese as immigrants would give virtually every other disappointed but determined asylum seeker hope for options other than repatriation and give strength to hard-core opponents of repatriation active in the camps. The anticipated impact is to undermine the credibility of the CPA statement adopted at the February Steering Committtee meeting in Geneva and to undermine the credibility of the resolve of the United States in particular. The Department of State necessarily will have to monitor this situation carefully and take these reactions into account.

13. It is important to understand that a workable alternative exists for qualified Vietnamese now in the camps who wish to immigrate to the United States. The U.S. Orderly Departure Program (ODP) constitutes an effective and safe alternative, without impacting on

other states in the region and therefore without adverse foreign policy consequences. As a reaction to the massive outflow of boat people from Vietnam in 1979, the Orderly Departure Program (ODP) was established under an agreement between UNHCR and the Socialist Republic of Vietnam to provide a safe and legal alternative to the illegal boat departures by Vietnamese seeking to emigrate to other countries.

14. Under the U.S. ODP program, which is based at the American Embassy in Bangkok, U.S. consular and Immigration and Naturalization Service (INS) officers visit Ho Chi Minh City on a regular basis to adjudicate immigrant visa and refugee applications of Vietnamese. U.S. ODP interviewing teams consist of 2-3 consular officers and 3-4 INS officers plus several contract employees present in Vietnam almost continuously, operating at a site in Ho Chi Minh City provided by the Vietnamese Government. There is a good working relationship between U.S. and Vietnamese officials overseeing the ODP, with any problems encountered in processing individual cases resolved locally. Since the inception of the U.S. ODP, over 360,000 Vietnamese have departed Vietnam to the U.S. under its auspices as immigrants, parolees, or refugees. Of these, about 160,000 persons have received immigrant visas, including about 69,000 Amerasians and their families. We anticipate that the U.S. ODP will issue about 12,000 immigrant visas in Fiscal Year 1994.

15. U.S. consular officers assigned to ODP speak Vietnamese and are thoroughly familiar with Vietnamese culture and practices, and with the civil documents required and available to complete immigrant visa applications. They are better qualified to adjudicate applications by Vietnamese than consular officers in the first-asylum countries, who may be knowledgeable only of the languages, practices, and civil documentation of their host countries.

16. Since the establishment of the CPA in 1989, Vietnamese asylum-seekers who are the beneficiaries of approved U.S. immigrant visa petitions, but who have been "screened out" under the CPA as non-refugees, have been encouraged to return voluntarily to Vietnam in order to process their visa applications through the ODP. The U.S. has sought to expedite the application process for immigrant visa applicants who repatriate by routinely putting them at the head of the processing queue in Vietnam. The American Embassy in Bangkok observes that the Vietnamese government does not impede the processing of these cases, and that on average it takes only 3-4 months for a repatriated applicant to be issued a visa by ODP in Vietnam. I am not aware of any case in which the Vietnamese government has refused to allow the departure of an individual issued an immigrant visa by ODP or of any substantiated instance in which a screened-out Vietnamese asylum-seeker who returned to Vietnam from a first-asylum country experienced persecution by the Vietnamese government. ODP immigrant visa operations dovetail with voluntary repatriations under the CPA to ensure that qualified applicants are moved through the system as quickly and efficiently as possible.

17. United States policy with regard to the CPA was designed to deal with the twin imperatives of humanitarian concern and the need to maintain a cooperative relationship with the countries in the region that would allow us to pursue our national interests in this and other areas. The CPA has been the engine of that cooperation. Any constraint on the United States Government's ability to implement immigrant visa processing in first asylum in a manner that it deems necessary to further implementation of the CPA could cause the U.S.' CPA partners to question the U.S. commitment to the CPA.

I declare under penalty of perjury that the foregoing is true and correct.

_____

Executed in Washington, D.C.
March 15, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civ. Action No. 04 0361 (SSH)

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LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

AFFIDAVIT OF ANNE WAGLEY

County of San Francisco:
State of California:

ANNE WAGLEY, being duly sworn, deposes and says:

1. My name is Anne Wagley. I am a United States citizen and reside at 127 Alvarado Road in Berkeley, California.

2. I resided in Hong Kong from September 1986 to July 1990. From September 1986 to May 1989 I served as a consultant to the International Rescue Committee of New York on the situation of Vietnamese asylum seekers. From June of 1989 to July of 1990, I was Field Assistant with the United Nations High Commissioner for Refugees in Whitehead Detention Centre, the largest of Hong Kong's detention centers.

3. As field representative for the UNHCR, I was responsible for overall coordination, development, monitoring and evaluation of all of the various programs implemented by the Hong Kong Government, the

UNHCR, and the voluntary agencies working in the detention center. These responsibilities required me to spend an average of eight to twelve hours a day at Whitehead. During this time I spoke with hundreds of Vietnamese asylum seekers concerning the procedures for determining refugee status, conditions at Whitehead, the opportunities available for resettlement abroad (or lack thereof), and the option of voluntary repatriation.

4. During the time I was in Whitehead there was a two-track system for screening: refugee status determination and family reunification determination. At the initial interview, during which family biographical data was taken, an individual could indicate that they were the beneficiary of an Immigration Visa petition for a third country. If this was the case, the second interview would be limited to the confirmation of biographical data. If there was no current petition, the individual would be screened under the refugee status procedure.

5. During the time I served in Hong Kong, it was the practice of the United States Consulate General to process as immigrants Vietnamese asylum seekers who were the beneficiaries of current immigrant visa petitions. The United States Consulate processed such cases regardless of whether the beneficiary had gone through the refugee status determination procedure, as it was not necessary for an individual to have been screened-in. As I was in constant contact with the asylum seekers, I was able to observe this practice first-hand and even assisted a number of individuals in completing processing formalities.

6. The United States Consulate processed the applications of such current immigrant visa beneficiaries, regardless of the immigrant visa category they fell under and, in at least one instance, processed the application of a Vietnamese asylum seeker who became eligible for an immigrant visa on the basis of a winning visa lottery number. I am aware of this case because I personally assisted this young man complete the necessary processing formalities, including fingerprinting and photographs. Following the completion of these formalities, the beneficiary, along with his younger sister, was removed from the detention center, interviewed by the United States Consulate and permitted to resettle in the United States.

7. Based on my first hand observations of the situation of Vietnamese asylum seekers in detention, it is my opinion that the existence of the family reunification-based immigration track had no impact in the decision of Vietnamese asylum seekers who were not beneficiaries of immigrant visa petitions to return voluntarily to Vietnam. Decisions concerning voluntary repatriation were driven by much more significant factors such as the conditions of confinement, the prospects of being screened-in as a refugee, and their perception of what their situation would be like if they returned to Vietnam. The existence of the immigration track gave no hope of resettlement to the average Vietnamese asylum seeker detained in Whitehead, since they knew that the track was based almost exclusively on family reunification and that they did not have a family relationship that would permit them to take advantage of it.

Anne Wagley

Sworn to me this
23 day of March, 1994

Barbara Paganini, Notary Public

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civ. Action No. 94-0361

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

DECLARATION OF MINH HAI

I, MINH HAI, declare:

1. My name is Minh Hai. My current residence is at 405 S. Hibiscus Way, Anaheim, California. I am the older brother of Son Ngoc Nguyen, who was previously residing in White Head Detention Center, VRD, #580/24/89/, in Hong Kong. Mr. Nguyen has recently returned to Vietnam and is currently residing in Vietnam. I have personal knowledge to the following and if called to testify in court, I would and could competently so testify.

2. In 1989, my brother fled Vietnam and sought asylum in Hong Kong. While in Hong Kong, my brother was married to Anneette Renee Ferguson, a U.S. born citizen. The marriage was officiated at the Registrar's Office in Shatin, Hong Kong, on October 28, 1992. (Exhibit A).

3. Immediately following the marriage, Ms. Ferguson, then Mrs. Nguyen, filed a visa petition for her husband, Mrs. Son Ngoc Nguyen, with the U.S. Immigration and Naturalization Service. The visa petition was approved

and was forwarded to the United States Consulate in Hong Kong ("the Consulate") for further processing.

4. On July 19, 1993, the Joint Voluntary Agency in Hong Kong informed Mrs. Nguyen that the Consulate had changed its policy and that the Consulate had stopped processing her husband's immigrant visa application.

5. Shortly thereafter, my brother received a letter from the Consulate, dated August 12, 1993, which informed him that, among other things, the Consulate would not process his immigrant visa application in Hong Kong and that he would have to return to Vietnam to proceses his application there through the Orderly Departure Program (ODP). (Exhibit B).

6. The Consulate also informed my brother that he must return to Vietnam within 90 days if he wished to apply for departure from Vietnam through the ODP. After that 90-day period, he would no longer be eligible to apply for immigrant visa through the ODP.

7. Because my brother feared that he would lose his eligibility for an immigrant visa under the ODP and he relied on the Consulate's representation that he would be allowed to apply for immigrant visa under said program, he voluntarily returned to Vietnam under the Voluntary Repatriation Program.

8. My brother returned to Vietnam on or about December 30, 1993.

9. Upon return to Vietnam, my brother immediately submitted an application for exit permit to the Vietnamese Government as the first step of applying for immigrant visa under the ODP. My brother has recently written me a letter to inform me that his application for exit permit had been rejected by the Vietnamese

Government because the Vietnamese government does not recognize a marriage performed outside of Vietnam. My brother, therefore, is no longer eligible to process his immigrant visa application in Vietnam under the ODP.

10. I, Minh Hai, declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in conformity with 28 U.S.C. Section 1746 in Westminster, California, on March 27, 1994.

MINH HAI

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 94-0361 (SSH)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL. *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

DECLARATION OF DR. NGUYEN DINH THANG

I, Dr. Nguyen Dinh Thang, declare:

1. My name is Dr. Nguyen Dinh Thang. My current residence is at 7815 Snead Lane, Falls Church, Virginia. For fifteen years, I have been actively engaged in issues relating to the plight of the Vietnamese boat people in Hong Kong and Southeast Asia. During this period, I have spoken with literally hundreds of Vietnamese asylum seekers and family members in the United States. I currently serve as Executive Director of Boat People, S.O.S., Inc. I am also a member of the board of directors of Legal Assistance for Vietnamese Asylum Seekers, Inc. ("LAVAS").

2. LAVAS' staff in Hong Kong currently consists of three full-time lawyers and one full-time bilingual legal assistant. During the last year, the Hong Kong office has assisted local Hong Kong counsel in the representation of several Vietnamese asylum seekers who are the beneficiaries of current immigrant visa ("IV") petitions.

Among those assisted by LAVAS' Hong Kong office include two of the class representatives in this action, Thu Hoa Thi Dang and Truc Hoa Thi Vo. LAVAS is also currently assisting three women who are the beneficiaries of IV petitions and who had been scheduled for forcible repatriation prior to the decision of the Court of Appeals' granting Plaintiffs motion for emergency relief in this action.

3. If IV beneficiaries are required to return to Vietnam to have their applications for immigration processed, LAVAS will be impaired in its efforts to assist them in respect of such processing. LAVAS does not have an office in Vietnam and does not have the resources to establish one.

4. The LAVAS office in Washington, D.C. has received information concerning twelve cases of IV applicants who have been affected by the Department of State's decision last year to refuse processing of IV cases. In most of these cases, the applicants did not receive notification of the Department's decision until December 1993 or January 1994.

5. The U.S. Consulate recently began sending packages of INS forms ("packet three"), accompanied by a letter from Wayne Leininger, to Vietnamese asylum seekers in Hong Kong who are the beneficiaries of IV petitions. This is likely to create a great deal of confusion for the recipients of such packages. In most cases, the petitioners had already been sent packet three and, in many cases, the forms had already been completed and the documents required by the U.S. Consulate had been submitted. In fact, just two days ago, I was contacted by the sponsor of an asylum seeker in Hong Kong who expressed his bafflement as to why he had been sent packet three when he had already filled out all the [*sic*] forms and submitted all the required documents.

6. The letter from Mr. Leininger will only add to this confusion. The letter states that processing of IV applications is being resumed, but it does not specify whether such processing will take place in Hong Kong or Vietnam. This is also likely to be deeply confusing to applicants who were informed only recently that they would have to return to Vietnam in order to be processed.

7. I, Dr. Nguyen Dinh Thang, declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in conformity with 28 U.S.C. § 1746 in Washington, D.C. on March, 28, 1994.

_____

Dr. Nguyen Dinh Thang

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 94-0361

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

DECLARATION OF LAN QUOC NGUYEN

I, Lan Quoc Nguyen, declare:

1. I am an attorney at law licensed to practice in the State of California and the federal courts. I received a B.A. in political Science from the University of California in Riverside in 1987 and a J.D. from the University of California, Hastings College of the Law in 1990. I have been practicing law for almost four years.

2. While in law school, I served on the editorial board of the Hastings International and Comparative Law Review, a scholarly law journal which publishes articles on international and comparative law issues. I also published an article in the same law review titled "Vietnamese Traditional Law—The LA Code—and the United States Modern Law: An Comparative Analysis." This article compares a Vietnamese traditional law code as it was promulgated in 1400s with the American modern law and highlights the advancement of Vietnamese law which existed almost 500 years ago.

3. I am fluent in speaking, writing and reading Vietnamese. I am familiar and knowledgeable about Vietnamese laws, the legal systems and the political structure through various periods.

4. I currently host two television and radio shows in Southern California about legal affairs in Vietnamese. I also write for several Vietnamese newspapers on selected topics relating to American and Vietnamese law.

5. I am familiar with the current Vietnamese laws and the country's legal and political system.

6. I am currently the Chairman of the Board of Directors and Southern California Regional Coordinator of Legal Assistance For Vietnamese Asylum Seekers ("LAVAS"). I have been associated with LAVAS since 1991. I am familiar with the current Vietnamese Boat People situation and its related legal issues.

7. I have read a news article about Vietnamese marriage law titled "Marriage Procedures Between Vietnamese Citizens and Foreigners" which was published in an official newspaper of the Vietnamese government. I have also read the Vietnamese version of said article which was translated by Mr. Van Thai Tran. A copy of the news article and its translation is attached hereto as Exhibit A.

8. The subject news article appears to reflect the state of the law on the issue of marriage performed outside of Vietnam or between a Vietnamese citizen and a foreign national as promulgated by the Vietnamese Government. It is a common practice in Vietnam to publish the laws which are newly promulgated and issued by the Vietnamese Government. The news article as published would serve as competent text of the law as if it was published in a law code.

9. From reading the text of the law in question in both Vietnamese and English, it is clear that the law states that the Vietnamese Government would not recognize a marriage involving a Vietnamese national and was performed outside of Vietnam unless such marriage was endorsed by the Vietnamese Government Official Representative such as a Vietnamese Consular official where the marriage took place.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in Westminster, California on March 28, 1994.

LAN QUOC NGUYEN

MARRIAGE PROCEDURES BETWEEN VIETNAMESE CITIZENS AND FOREIGNERS

On 1-2-1989, the Council of Ministers introduced a "Directive on procedures of marriages between Vietnamese citizens and foreigners before the governing authority of the Socialist Republic of Vietnam." Regarding general applications, the directive relates to:

The term foreigners in the directive are described as individuals who do not possess Vietnamese citizenship, including individuals who are citizens of other countries or are stateless.

The foreign individual has the right to marry according to the laws of the individual's citizenship or according to the laws of the individual's country of permanent residency at the time of the individual's filing for marriage (applicable to those who do not hold citizenship) based on the various regulations of Rules 5, 6 and 7 of the Law on Marriage and the Family of Vietnam. These individuals may be able to register for marriage with Vietnamese nationals.

Similar to Rule 54 of the Law on Marriage and the Family, if a foreigner is a citizen of a country that had signed the Treaty of Mutual Legal Assistance with the Socialist Republic of Vietnam, then the compliance with the terms of the Treaty relating to marriage is fulfilled.

The government bodies that have the authority to recognize the marriage between a Vietnamese citizen, and a foreigner are the People's Committee at the municipal level, under the Central government, and equivalent administrative districts from which the Vietnamese national resides.

With cases of Vietnamese citizens living outside the country at the time of registration for marriage with a

foreigner, if the individual made the request that is not contrary to the laws of the individual's country of current residency or the Treaty on Exchange of Consulates between the Socialist Republic of Vietnam and the country of current residency, as recognized by foreign ministry representatives or consulates of the Socialist Republic of Vietnam and the country of current residency. In this case the foreigner need not abide by the various regulations of Rules 5 and 6 of the Law on Marriage and the Family of Vietnam.

Regarding marriage registration procedures, the directive indicates:

Concerning Vietnamese citizens who currently serve in branches of the military that involves national security. . . .

Translated by Van Thai Tran

I declare under penalty of perjury that I am proficient in both English and Vietnamese and that I am competent to translate from Vietnamese to English.

Dated: March 28, 1994

VAN THAI TRAN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 94-0361

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

SUPPLEMENTAL AFFIDAVIT OF SHEPARD C. LOWMAN

District of Columbia:

SHEPARD C. LOWMAN, being duly sworn, deposes and says:

1. I submit this affidavit as a supplement to my previous affidavits dated February 24, 1994. This supplemental affidavit addresses four issues raised in the Affidavit of Brunson McKinley, dated March 15, 1994 ("McKinley Aff."), the Affidavit of Wayne Leininger, dated March 15, 1994 "Leininger Aff. I") and the Affidavit of Matthew C. Victor, dated March 15, 1994 ("Victor Aff."). These four issues are: (1) clarification of U.S. policy with respect to the processing of immigrant visa ("IV") applications of Vietnamese asylum-seekers detained in Hong Kong; (2) the impact of processing such applications on the voluntary repatriation program; (3) the impact on the efforts of family members to reunite if the beneficiaries of IV petitions were required to return to Vietnam in order to be processed; and (4) the current living conditions in Hong Kong's detention centers.

Clarification of U.S. Policy With Respect To IV Processing

2. In his affidavit, Mr. Leininger suggests that certain statements that I made in my initial affidavit with respect to the processing of IV beneficiaries by the Hong Kong Immigration Department ("HKID") were incorrect. Though I believe my description of the process to be basically accurate, the process is quite complicated and it may be useful to provide some further explanation to create a more complete picture.

3. The HKID operates a two-track screening process: a family reunification track and a refugee track. Under the family reunification track, the HKID will "screen-in" the spouse, child under the age of 21 or parent over the age of 50 of a United States citizen or permanent resident alien who entered the United States as a refugee.

4. Generally, a familial relationship that may qualify an asylum-seeker to immigrate to the United States or some other resettlement country will first be identified by the United Nations High Commissioner for Refugees ("UNHCR"). Such relationships are then reported to the HKID which, in turn, will seek to confirm those relationships, involving a U.S. link, with the United States Consulate General in Hong Kong ("the U.S. Consulate").

5. The response of the U.S. Consulate will determine how HKID processes the case. If the U.S. Consulate confirms that the asylum-seeker meets the criteria under the HKID's family reunion track, the asylum seeker will be screened-in on the basis of the family relationship without an individual refugee status adjudication. The basis for this is described in Department of

State Cable No. 383839 of 21 November 1991. (Def. Exh. B-3)[1]

6. If an asylum seeker who was screened-in on the family reunion track by HKID was the beneficiary of a current IV petition, the U.S. Consulate would process the case to its conclusion and issue a visa to the applicant once he or she was determined to be eligible.[2]

7. In addition to screening-in those IV beneficiaries who meet the HKID's criteria under its family reunion track, the HKID has also facilitated the processing by the U.S. Consulate of the cases of those who are the beneficiaries of current IV petitions, but who do not meet the HKID's family reunion criteria. In such cases (typically involving siblings, adult children, parents under the age of 50 and all qualifying relationships in which the sponsoring relative entered the United States as an immigrant), the HKID would, pursuant to Section 13D(2) of the Immigration Ordinance, release the asylum-seeker for

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[1] In some cases, a familial relationship was only discovered or established after the screening process in Hong Kong had begun or is completed. This is not surprising given the duration of detention and the dynamic nature of refugee populations. As stated in Mr. Leininger's affidavit, in some such cases the HKID has, when advised by the Consulate General of an existing U.S. relative relationship, reversed previous "screened-out" decisions to "screened-in," solely to facilitate processing of the IV applications by the U.S. Consualte (Leininger Aff. ¶ 10).

[2] If an asylum seeker who was screened-in on the family reunion track was not the beneficiary of a current IV petition, the case would be presented to the INS for a refugee status adjudication. If found by INS to be qualified as a refugee, the applicant would be so processed. If not, it is my understanding that, until June 1993, the applicant would be granted public interest parole.

processing by the U.S. Consulate upon receipt of a letter from the U.S. Consulate requesting that HKID make him or her available for that purpose.[3]

8. The recent shift in the U.S. Consulate's policy applies both to beneficiaries of current IV petitions who meet the criteria under Hong Kong's family reunification track and beneficiaries who do not. This fact is illustrated by the cases of the two class representatives in this action, Thu Hoa Thi Dang and Tru Hoa Thi Vo. Had it not been for the change in policy, Mrs. Vo, as a child of a U.S. citizen over the age of 21, would not have qualified under the HKID's family reunification track, but would have been permitted to leave the detention center for processing under Section 13D(2). On the other hand, Mrs. Dang, as the spouse of a U.S. citizen who entered the United States as a refugee, would have qualified under the HKID's family reunification track and been screened-in. Pursuant to the State Department's 1993 policy shift, however, both Mrs. Vo and Mrs. Dang were informed that they could only be processed if they returned to Vietnam.[4]

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[3]During this period, the HKID would suspend the refugee status determination process. (Aff Leininger, para 12).

[4]This is made clear in Mr. Victor's letter of September 24, 1993 to Mr. K.H. Yim, Principal Immigration Officer, HKID. This letter was explicit in stating that the U.S. Consulate would only process the immigrant visa cases of persons recognized as refugees and would not process the immigrant visa request of either a person awaiting a screening decision or screened-out as a refugee. It further stated that the use of 13D(2) would be limited to persons recommended for resettlement in the United States by the UN Committee for Vulnerable Persons, a Committee established to examine primarily unaccompanied refugee minors and victims of violence. (Lowman Aff. Exh. B).

9. This policy shift had the effect of forcing into the refugee track beneficiaries of current IV petitions of both types who had previously had their petitions processed to conclusion in Hong Kong. Moreover, the Department's policy was apparently applied retroactively to cover the cases of IV beneficiaries whose relationships had previously been confirmed to the HKID and who may have already been "screened-in" under the family reunification criteria based on those relationships. To this end, the U.S. Consulate sent a list of more than 50 IV beneficiaries, many of which were documented and ready for processing by the U.S. Consulate, to the HKID and informed it that, although these cases may have been previously qualified under the family reunification track, the U.S. Consulate would not process them unless they received an individual refugee status adjudication and were found qualified as a refugee on their own merits.

Impact Of IV Processing On Voluntary Repatriation

10. In his affidavit, Mr. McKinley expresses concern that the processing of current IV petitions in Hong Kong could alter the perception of the asylum seekers that they have no alternative but to return home and that, in turn, could reduce voluntary repatriation. (McKinley Aff. ¶¶ 9-12.) Experience over the years demonstrates that such concern is unfounded. A considerable number of current IV holders have been processed from Hong Kong for resettlement in the United States since the inception of Hong Kong's screening policy in June 1988.[5] Despite this

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[5]In his affidavit, Mr. Leininger states that: "Prior to 1989 and the advent of the CPA such cases were not an issue, since there was no screening process and all arrivals from Vietnam were granted presumptive refugee status by the Hong Kong government, and could be considered as candidates for resettlement." (Leininger Aff. I ¶ 4.) This is incorrect. Hong Kong began screening unilaterally in June 1988, one year before the adoption of the CPA.

fact, Hong Kong has had by far the highest rate of voluntary return of Vietnamese asylum seekers in the region.

11. I have visited Vietnamese refugee camps repeatedly since the fall of Saigon to North Vietnamese forces and have always been struck by the asylum-seekers' awareness of United States policies, regulations, and processing criteria. This awareness is a function of both their exposure to long-standing procedures and practices and a triangular flow of information between the camps, overseas Vietnamese communities and friends and family at home. In my view, it is certain that the Vietnamese in the Hong Kong camps are fully aware of the criteria on which the beneficiaries of current IV petitions are allowed to be processed and would not themselves be affected in their decision on voluntary repatriation if they did not meet this criteria in their own case. That decision is affected by a variety of much more important factors such as the prospects for being "screened-in" as a refugee, camp conditions and the human rights situation in Vietnam. Moreover, there is no reason to suppose that the impact of the continuation of such processing in the future on the voluntary repatriation program would be any different than it has been in the past.

12. As noted in my previous affidavit, the Comprehensive Plan of Action ("CPA") at no point speaks of the return home of Vietnamese boat people qualified for resettlement abroad on other than refugee grounds. The central point of the CPA is to establish a refugee status adjudication procedure and to remove the hope of resettlement as a refugee of persons not found to be so qualified. The Department of State, responding to concerns of the United States Consulate General in Hong Kong, puts it as follows:

> "Post maintains in Reftel paragraph five that processing subject's IV case in Hong Kong would contravene the CPA because subject has been determined [to] be a non-refugee. That would of course be true if we were proposing to resettle her as a refugee. However, she would be coming as an immigrant and, as post reports, in Reftel, all major resettlement countries have made similar requests to release detainees for immigration." (State Cable No. 422906, 14 December 1990, attached to Leininger I Aff. as Def. Exh. B-2.)

Impact of Repatriation On Family Reunification

13. In his affidavit, Mr. McKinley describes the Orderly Departure Program ("ODP") as a workable alternative to the processing of immigrants in the countries of Southeast Asia where asylum seekers have found refuge. (McKinley Aff. ¶¶ 13-16.) There is no doubt that the ODP has been a great success, offering the opportunity for refugee resettlement and family reunification to hundreds of thousands. It is less clear that it is a fair or effective answer to an asylum seeker who has fled Vietnam by boat and is residing in a detention center abroad. In the normal situation, the beneficiary of a current IV petition can walk into a U.S. consulate where he or she is resident, have that visa processed and leave to join his or her loved-ones in the United States. In this case, however, to quote State Department cable no. 422906:

> "The alternative to processing subject's immigrant visa application to conclusion in Hong Kong would be for UNHCR to counsel her to return voluntarily to Vietnam. If she agreed, file would then be transferred to ODP in Bangkok, subject would have to obtain Vietnamese exit permit, SRV would have to

> advise us she had exit permission, ODP would schedule her for interview in Ho Chi Minh City and, if approved she would be manifested to depart and a few monthe later leave for the United States. This strikes Department as procedural overkill and not at all necessary to preserve the integrity of the CPA." (Def. Exh. B-2.)

14. This description of the repatriation alternative as "procedural overkill" is correct. More importantly, it demonstrates that Mr. McKinley's description of the ODP as a workable alternative is incorrect. Mr. McKinley notes that to "the U.S. has sought to expedite the application process for immigrant visa applicants who repatriate by putting them at the head of the processing queue in Vietnam." He also notes that he is "not aware of any case in which the Vietnamese government has refused to allow the departure of an individual issued an immigrant visa by ODP." (McKinley Aff. ¶ 16.) That is fine so far as it goes. But there are a great many other obstacles to resettlement for the IV applicant who is not permitted to be processed in Hong Kong. These obstacles exist at every phase of the laborious procedures described in State cable no. 422906. They are worth noting step by step.

15. First, the asylum seeker must be counseled by UNHCR and must decide to return home. This is in itself problematic. Many interviews with Vietnamese boat people in the camps of Southeast Asia over a period of many years leave me firmly convinced that most of the asylum seekers are afraid of returning to Vietnam. It is understood that the policies at issue relate only to those asylum seekers either not yet screened or screened and found not to be refugees. In the case of those screened-out, the Hong Kong immigration authorities have found the asylum seeker not to have a "well-

founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" under the 1951 Geneva Convention Relating to the Status of Refugees. However, whether they have a well-founded fear of persecution or not, in a legal sense, my long experience is that most asylum seekers are, in fact, afraid to go home. As the human rights monitoring group, Asia Watch, has reported

> The vast majority of Vietnamese who have fled to Hong Kong are reluctant to return home, despite the harsh conditions of detention and the very low chance of resettlement in another country. One woman interviewed recently as she awaited return on the voluntary program succinctly expressed the fears of many to a reporter. "I will never be free, I am going back to Vietnam . . . Nobody knows what will happen to us. And can anyone really help us once we're back."

(*Asia Watch Report*, "Indefinite Detention and Mandatory Repatriation: The Incarceration of Vietnamese in Hong Kong," at 4 (Dec. 3, 1991), attached hereto as Exhibit A.)

16. The consequence of this is that most of those not yet screened will wait until their screening is complete before returning home. If their IV petitions are current but are not being processed in Hong Kong, this means more time lost in detention. Even for those screened-out, many will fear to return home and will resist voluntary repatriation. I have seen many instances of such behavior. A sad example was a young man in Hong Kong who was slowly going blind. Some members of his family were preparing to leave Vietnam by ODP and he was told, if he returned, he could come out with them. I

strongly urged the young man to return and it was clearly in his best interest to do so. But he feared to return and while all of his family are now in the United States, he remains ill and alone in Hong Kong. The point here is that Vietnamese boat people in Hong Kong have risked the dangers of flight from a repressive government and have endured years in detention under terrible conditions. It is then perhaps not surprising that they do not always make choices which the Department of State believes is in their own best interests. However one evaluates the wisdom of those choices, the refusal of the Department to process their IV petitions in Hong Kong will prolong both the detention of virtually all IV beneficiaries and the time they are separated from their families in the United States.

17. For those asylum seekers who take UNHCR's advice and apply for voluntary repatriation, despite any fears they may have of the consequences, the situation will still be much worse than had they been permitted to resettle directly from Hong Kong. First, these individuals must complete the process of applying for voluntary repatriation, wait for clearance from the Hanoi authorities and stand in line for a voluntary repatriation flight. Though the time it takes to complete this process has varied, it is safe to assume that in the average case several months or more will pass.

18. Next, as State cable No. 422906 points out, the "subject would have to obtain Vietnamese exit permit" and the "SRV [Socialist Republic of Vietnam] would have to advise us she had exit permission." These are processes which do not rest in the hands of the United States Government. They can be long, time consuming, and expensive, as a result of a cumbersome, inefficient and corrupt Vietnamese bureaucracy.

19. Being placed at the front of the ODP line will not be helpful to a returnee if the SRV never advises U.S. officials that exit permission has been granted. Indeed, the issuance of the exit permit may well be refused and has been in instances in the past. Of particular relevance in this connection is the fact that Vietnamese law does not recognize the validity of a foreign marriage and, in the only case that I am aware of in which an IV beneficiary who married in Hong Kong returned to Vietnam, the SRV apparently has refused to grant exit permission. It is good, of course, that Mr. McKinley is not aware of "any case in which the Vietnamese government has refused to allow the departure of an individual issued an immigrant visa by ODP." But it would be mistaken to imply more than tangential relevance to this fact since no visa is issued prior to the issuance of the exit permit.

20. Even if successful, the time required to obtain an exit permit from the Vietnamese Government is uncertain. Vietnamese Americans who have gone through the process describe it as arbitrary and unpredictable. They report that while the period may vary widely, it ordinarily will take the applicant at least four to six months to secure exit permission.

21. Once the Vietnamese exit permit is obtained and notification thereof is provided to the U.S. ODP officials, an interview is scheduled for the applicant in Ho Chi Minh City. If the applicant happens to live in Ho Chi Minh City this is not a problem. If he lives far away, however, he may face a long and difficult trip, involving several days of travel by bus on bad roads. And even after the applicant is approved for an immigrant visa, there are out processing formalities and medical exam which increase the time still further during which the applicant must remain in Vietnam.

22. Accordingly, if all goes well, it will generally take an applicant at least one year after he or she is counseled by UNHCR to repatriate before he or she will be in a position to depart Vietnam by ODP. The bulk of this time will be spent in Vietnam, where the applicant will live in fear of harassment and persecution by Vietnamese authorities, in uncertainty that those authorities will grant him or her an exit permit, and in conditions of economic and social distress. The applicant will likely have disposed of his or her home and other possessions before fleeing to Hong Kong.

23. Moreover, as one who has fled to the camps abroad and upon return is now seeking to resettle to the United States, the applicant can look to little sympathy or support from the government in Hanoi and, less so, from local authorities where he or she may be living. Indeed, Asia Watch has reported "a disturbing pattern of interrogation and low-level harassment of voluntary returnees," including a requirement that all returnees undergo several days of reindoctrination in Hanoi in which they are grilled about their activities in Hong Kong and warned not to try escaping again, a requirement in some cases that the returnee "report [his or her] activities to their local police station regularly," and a perception among others that "their difficulty in getting jobs or businesses or fishing licenses is due primarily to their status." (Exh. A. at 22-23.)

24. In short, the applicant who is denied IV processing in Hong Kong may fear to return to Vietnam, regardless of the screening decision, and refuse to return home. If the applicant can be persuaded to repatriate, he or she may find that the Vietnamese government refuses to issue an exit permit. However, barring these extremes, the applicant faces an average of a year's delay, most endured under degrading, expensive and traumatic circumstances.

Conditions of Detention, In Hong Kong

25. In his affidavit, Mr. Victor, states that "the overcrowding problem began to improve dramatically" as the asylum seeker population in Hong Kong declined. "The latest figures show that Hong Kong houses 28, 589 asylum seekers in facilities designed to accommodate 43,224." (Victor Aff. ¶ 3.) These statements paint an inaccurate picture of the current situation. For years, overcrowding in Hong Kong's camps has been endemic. When the refugee population became lower, facilities were closed and crowding continued in those remaining. When the population soared, facilities were opened. Thus, recently, as the population in Hong Kong declined, whole camps or sections of major camps have been closed. Where there were previously ten detention centers, there are now only three; High Island, Tai Ai Chau and Whitehead, and there are reports that Tai Ai Chau will be closed soon.

26. The situation at Whitehead Detention Centre—the largest of the Hong Kong Camps—gives a far more accurate portrayal of the situation than the statistics cited by Mr. Victor. Whitehead has traditionally housed about 20,000 asylum seekers; approximately 2,000 in each of its ten sections. The present population of Whitehead is approximately 18,000, with one of the ten sections housing a smaller number of people because it is devoted exclusively to voluntary repatriation. Accordingly, for approximately two thirds of those detained in Hong Kong, the overcrowding situation is roughly the same as it has been for the last five years.

27. Now, as in the past, accommodations at Whitehead and elsewhere "consist of metal longhouses . . . lined by tight rows of triple-tier bunk beds," each of which house approximately 300 people. (Exh. A. at 4.) As the Asia

Watch Report notes, "whole families inhabit one bed platform," which are typically about four feet in width, eight feet in length and about three and one half feet in height. (*Id.*) No privacy exists whatsoever. Asia Watch describes the consequences of detention in these conditions, many of which are self-evident to any eye-witness observer, as follows:

> The crowded conditions make for poor hygiene. Skin diseases often result from the lack of warm water for washing, rats and outbreaks of communicable infections are common. . . . Depression, child abuse, family breakdown and delinquency are well-documented effects of detention on camp residents. Numerous public health specialists have voiced concern that the psychological damage wrought by detention, especially upon children, is long lasting and makes reintegration into normal society problematic. Camp inmates often complain of unremitting boredom, anxiety or hopelessness, and many wander around listlessly or sleep through the day. (*Id.*)

28. Mr. Victor also asserts that educational, social and vocational programs in the camps are "widely available." (Victor Aff. ¶¶ 5, 8,) This is incorrect. As the Asia Watch report states, "[o]nly limited schooling is available, particularly for older children and adolescents." (Exh. A at 4.) Social and employment programs in the Hong Kong camps have never been adequate. Contrary to the suggestion in Mr. Victor's affidavit, this situation has gotten worse, not better. In the last two years many of the programs to which he refers have been scaled back or eliminated as part of a concerted effort to pressure the boat people to return voluntarily. (*See* "Tough New Stance to Send Home Boat People," South China Morning Post, Mar. 23, 1993, attached hereto as Exhibit B.)

29. Finally, Mr. Victor's comments on the crime rate in Whitehead misses the critical point that most such crime goes unreported. (Victor Aff. ¶¶ 6-7.) As one camp worker described the situation as of just last year, Hong Kong's camps:

> in many instances can only be described as "ghettoes of crime and violence" . . . [The criminal elements] come at night, wearing masks and brandishing knives, to intimidate and rob the people of money and jewelry[.] . . . Although 300 inmates of the hut shout and scream, no one from the Correctional Services Department arrives [until] the robbers have taken what they want and are gone. Stabbings, beatings and murders occur from time to time, but no one can inform because his or her life is in danger.

(Carole McDonald, "The CAP and the Children: A Personal Perspective," 5 Int'l J. Refugee L. 580, 582 (1993), attached hereto as Exhibit C.) Similarly, the Asia Watch Report notes that, women often try to "solve" the rape problem in Hong Kong's detention centers "by establishing a sexual relationship with a man who can protect them from others rather than by reporting abuse to the authorities." (Exh. A at 4.) Thus, while one would hope that Mr. Victor's statistics could be taken as indicative of an improvement, reports I have received indicate little or no change from the "endemic" violence described in Asia Watch's December 1991 report (Exh. A at 4.). Indeed, Correctional Services Department Senior Superintendent Mr. Ivan Wong Yoe-lin stated just last year, "In Whitehead you have 2,000 in one section. I don't think you can guarantee the life of one Vietnamese." ("Boat People Safety 'Cannot be Assured,'" South China Morning Post, Feb. 25, 1993, attached hereto as Exhibit D.). The decent populations

in the camps still live in fear. Visitors to the detention centers have often reported instances in which asylum seekers informed them that they were "volunteering" to return home because they feared that they or their families would eventually become victims of rape or violent assault if they remained in the camps much longer.

30. Finally, any improvement which may have occurred is destined to be short lived. In 1993, a number of asylum seekers suspected of criminal activities were transferred to a small detention center at Nei Kwu Chau. I am informed that in February of this year, the Hong Kong Government closed Nei Kwu Chau and transferred some two hundred such suspected criminals back to the remaining camps, over the protest of UNHCR. Once these people reestablish their networks, any improvement in the reported crime rate noted in Mr. Victor's affidavit which may have occurred can be expected to disappear.

_____
Shepard C. Lowman

Sworn to me this 29th
day of March, 1994

_____
My Commission expires: 6/30/95

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civ. Action No.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants.*

SUPPLEMENTAL
AFFIDAVIT OF MATTHEW C. VICTOR

1. I, Matthew C. Victor, submit this affidavit as a supplement to my previous affidavit dated March 14, 1994. This supplemental affidavit addresses several issues raised in the Declaration of Thu Hoa Thi Dang, dated March 25, 1994 ("Thu Hoa Thi Dang Decl.") and the Supplemental Affidavit or Shepard C. Lowman, dated March 29, 1994 ("Lowman Supl. Aff.").

The Facts Surrounding the Refugee Asylum Request of Thu Hoa Thi Dang

2. Ms. Dang claims in her declaration submitted to the court that she did not contest her negative first instance screening decision (based on Convention grounds) because she was under the false impression that she would be screened in under family reunion guidelines (Dang Decl., para 25). HKID rejected Ms. Dang's asylum request on Convention grounds on October 7, 1993. All persons whose claims are rejected are informed in writing by HKID. On December 20, 1993, I wrote to

Ms. Dang (as well as her husband in the United States) to make her aware that, as a result of this negative decision and then current U.S. policy on processing the IV applications of the screened out, she would have to return to Vietnam to pursue her immigrant visa request. On December 23, 1993 a letter on Consulate letterhead with my signature appeared in a monthly UNHCR bulletin which is translated into Vietnamese and widely distributed in the camps (Exhibit A). In that letter I explained U.S. policy of requiring screened out asylum seekers who are also the spouses of U.S. citizens to return to Vietnam to apply for resettlement through ODP. Ms. Dang states that her name appeared on a list posted on the camp information board on December 31, 1993 (Dang Decl., para 26). She states that this was a list of those who had been denied refugee status by the Refugee Status Review Board (RSRB).

3. According to HKID records (Exhibit B—Screening status list of U.S. linked cases, name #105), the RSRB did not deny Ms. Dang's refugee claim until January 18, 1994. The list posted in camp on December 31, 1993, in fact, was not a list of those denied refugee status. Rather, it was a warning to those who had failed to contest a first instance screening decision that there cases would soon come up for review. They were asked to submit any additional documents to support their refugee claim. Ms. Dang states that she was aware at that time that we would not process her visa application in Hong Kong (Dang Decl., para 27). Apparently Ms. Dang did not heed the many warnings she received that she should pursue her asylum request through normal screening procedures.

4. In paragraph 17 of his affidavit, Mr. Lowman expresses his opinion that "it is safe to assume that in the average case several months or more will pass"

between the time that a person volunteers to return home and the time they arrive back in Vietnam. In fact, UNHCR officials have informed me that the average time it takes to process a voluntary repatriation case is 5-6 weeks.

Current Living Conditions in Detention in Hong Kong

5. Mr. Lowman in paragraph 25 continues to maintain that overcrowding is endemic in the Hong Kong refugee camps. There is no arguing the fact that Hong Kong authorities had a difficult time accomodating the great influx of Vietnamese boat people arriving from 1988 to 1991, resulting in a great deal of overcrowding. At its worst, in 1991, Hong Kong was housing 60,154 asylum seekers in facilities designed for only 57,500. However, as I outlined in my original affidavit (paras 3-5), the situation has improved dramatically in the last two years. Hong Kong is now home to 28,589 asylum seekers in centers designed to house 43,224.

6. Mr. Lowman states that Hong Kong has reduced the number of detention facilities being used to house Vietnamese asylees (Lowman Suppl. Aff., para 25). This is correct. However, as the above figures show, the decrease in available detention space has been far outstripped by the drop in the number of Indochinese asylum seekers residing here, resulting in a great improvement in living conditions. Mr. Lowman states that there are presently only three detention centers in Hong Kong housing Vietnamese asylum seekers (para 25). This is incorrect. At the moment there are six detention centers being used to house Indochinese asylum seekers in Hong Kong: High Island, Whitehead, Tai A Chau, Green Island, Chimawan Upper, Chimawan Lower. In addition there are three centers holding recognized refugees or those being processed for resettlement: Kai Tak, New Horizons, and Pillar Point.

7. Mr. Lowman quotes extensively from a 1991 Asia Watch report and his own personal experience to counter statements made in my affidavit. Simply put, this information is woefully out of date. All visitors to detention camps in Hong Kong must ask for prior Hong Kong government approval. Hong Kong authorities inform us that, to the best of their knowledge, Mr. Lowman has not visited a detention camp in Hong Kong for two years (Exhibit C—statement from Hong Kong Government Refugee Coordinator Brian Bresnihan). As I stated in my affidavit (para 2), I visit Hong Kong's detention facilities approximately every two weeks and meet frequently with officials dealing with refugee affairs, including the UNHCR welfare officer. I believe I am a more credible source of current information on living conditions in the camps than those cited by the Plaintiffs.

8. In his affidavit Mr. Lowman states that social and employment programs in detention have recently been cut (Lowman Suppl. Aff. para 28). This is only partly true. While adult educational programs that did not assist in reintegration into Vietnam have been reduced, primary education remains a guarantee for all children in detention, at a level far higher than that available to the average resident of Vietnam. Hong Kong authorities argue, with good reason, that extensive social programs are out of place among a population made up predominately of screened out asylum seekers who are awaiting return to their home country. They have accordingly reduced some social programs which they feel are inappropriate.

9. Mr. Lowman states that most crime goes unreported (Lowman Suppl. Aff. para 29). I believe this is a truism worldwide. I think the crime statistics quoted in my original affidavit speak for themselves as evidence of a sharp downward trend over the last two years and I do not want to belabor the point further. Suffice it to say

that murder in a detention center is always noticed by camp authorities (although the crime may not be solved). As I reported in my affidavit (para 7), Whitehead's murder rate in 1992 was on a par with Louisiana and New York.

_____
Matthew C. Victor

Sworn to me this 31st
day of March, 1994

_____
Clyde L. Jones, American Consul

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 94-0361

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

Plaintiffs,

SUPPLEMENTAL AFFIDAVIT OF WAYNE S. LEININGER

1. I submit this affidavit as a supplement to my affidavits of March 4, 1994, and March 15, 1994, in order, inter alia, to respond to plaintiffs' statement asserting certain "non-disputed" material facts of March 30, 1994 ("the Statement"), and to address the points raised by Mr. Shepard C. Lowman in his affidavit of March 29, 1994 ("Lowman affidavit.").

2. The Statement in paragraph 9 places the number of estimated Vietnamese asylum seekers who have arrived in Hong Kong since June of 1988 at approximately 104,000. A more accurate number, as reported by the U.N. High Commissioner for Refugees (UNHCR), is 71,470 (Attachment 1).

3. The Statement in paragraph 23 notes that in order to obtain Hong Kong police certificates it has been necessary for Vietnamese asylum-seekers detained in Hong Kong to appear personally at an office of the Royal Hong Kong police. This has been required (of all persons

seeking police certificates, not just those detained in the camps in Hong Kong) so that fingerprints might be taken. On March 30, 1994, Mr. Brian Bresnihan, the Hong Kong Refugee Coordinator, informed me that Vietnamese in the camps seeking police certificates could have their fingerprints taken by Correctional Services Department personnel in the camps themselves. Mr. Bresnihan noted further that—to assist those who, lacking primary civil documents, must resort to statutory declarations as secondary evidence—the respective camp commanders were fully empowered to act as notaries. For neither purpose, then, will it be necessary for Vietnamese visa petition beneficiaries to appear personally at any Hong Kong Government office.

4. The statement in paragraphs 25 and 26 attempts to describe the circumstances under which the Consulate General wrote, and under which it now can not write, so-called "Section 13(D)(2)" letters to the Hong Kong Government. Further background information is necessary for a complete understanding of this situation. Under Section 13(D)(2) of the Hong Kong Immigration Ordinance, the Hong Kong Government has a dual obligation: to facilitate a detainee's application for entry documentation to a country of possible resettlement and —should that application prove successful—to release that individual from detention so that onward travel can be carried out. Until recently, the Hong Kong Government required letters from foreign consulates requesting that it exercise its Section 13(D)(2) responsibilities in both of these circumstances, and levying, in the exchange of correspondence, the expectation that the subject of the letter would be resettled within a specific period of time. The Consulate General's letter of September 24, 1993, cited by the statement, is clear in its context that 13(D)(2) letters would no longer be provided by the Consulate General in connection with the

processing of immigrant visa applications of those in the camps. This was so since (as stated in paragraph 8 of my affidavit of March 14, 1994) the Consulate General was not and is not properly in a position to offer advance assurances of resettlement before the immigrant visa interview takes place. The Consulate General can and will issue such letters after an applicant has demonstrated eligibility for and been issued an immigrant visa, in order to ensure release from detention for onward travel to the U.S. We have also (as stated as well in paragraph 8 of my March 14 affidavit) worked out other arrangements with the Hong Kong Government concerning the appearance of applicants at the Consulate General for their formal immigrant visa interviews.

5. The Statement's assertions in paragraphs 27 and 28 concerning the actions and alleged inactions of the Consulate General in confirming family relationships of immigrant visa beneficiaries to the Hong Kong Government are inaccurate. There was no change in policy or practice before or since April of 1993. Information on the nature of the family relationships; the status of the sponsor in the United States; the basis on which immigrant visa petitions or VISAS 93 (see paragraph 4 of my March 14 affidavit) procedures were initiated; and the status of any resulting pending visa applications, was and is routinely shared with the Hong Kong Government and with the UNHCR. The weight which the Hong Kong Government attaches to this information in its screening activities or in its decisions on candidates for inclusion on Orderly Departure Program flight manifests is something outside of the Consulate General's control.

6. This explanation is relevant as well to the statements in paragraphs 7 and 8 of the Lowman affidavit. While it is true that the Consulate General does not exe-

cute 13(D)(2) letters for immigrant visa applicants detained in the camps to facilitate their appearance at the Consulate General for interview, such letters are not necessary for them to pursue their applications. The implication in paragraph 8 that Ms. Vo has been somehow disadvantaged by not having such a letter issued on her behalf is therefore incorrect. The change in policy similarly had nothing to do with the finding of the Hong Kong Government that Ms. Dang was not a refugee. As explained in paragraph 13 of my March 14 affidavit, in order to qualify for "following to join" status under the "VISAS 93" program—that is (to use Mr. Lowman's terminology, to be put on the "family reunification track"), the relationship between petitioner and beneficiary must have been in existence at the time the petitioner's refugee status was granted (8 CFR 208.21(b), Attachment 2). Ms. Dang's marriage took place after her husband's arrival in the United States, and this by no one's standards—not those of the U.S., nor of the Hong Kong Government, nor of the UNHCR—ever entitled nor now entitles her automatically to refugee status.

7. Mr. Lowman's observations in paragraph 9 of his affidavit are misleading. No change in policy at this Consulate General regarding the processing of the immigrant visa cases of the screened-out could ever have resulted either in pushing such a screened-out asylum seeker into the "refugee track" or in denying refugee status to anyone previously screened-in. A screened-out asylum seeker, by definition, is not entitled to refugee status; he could not have been "pushed into the refugee track." A screened-in asylum seeker, conversely, has always been processed for admission to the United States at this post, either as a refugee, or—to conserve refugee numbers—as an immigrant, if he or she also qualified for that status. No screened-in asylum seeker has ever had that status "revoked" as a result of

a change in policy or practice with respect to processing the immigrant visa applications of the screened-out. Only immigrant visa beneficiaries who had been screened-out received letters from Matthew Victor informing them that (at that time) the Consulate General would not be in a position to complete the processing of their cases. Mr. Lowman's broad and uncritical use of the term "family reunification track" to encompass the cases of the screened-in; the screened-out beneficiaries of immigrant visa petitions; the VISAS 93 beneficiaries; and even the beneficiaries of public interest parole granted under wholly separate authority by the U.S. Immigration and Naturalization Service has created confusion in this area.

8. Footnote 5 to the Lowman affidavit accurately notes that the Hong Kong Government had embarked independently in June of 1988 on a screening program of claims to refugee status, but it misses the point that it was only after the June, 1989 CPA agreement that the United States Government was in any way obliged to take screening status into account in setting its immigrant visa processing policy. The Department's August, 1989 cable, providing the first post-CPA guidance, was an explicit recognition of these new obligations. That message, and the subsequent telegrams to the field issued as the Department's policy evolved, constitute a continuous record of weighing of the equities involved on both sides of the question.

9. The fears voiced by Mr. Lowman in paragraph 16 of his affidavit that the beneficiary of a current petition whose screening status is uncertain will waste time waiting in detention are unfounded. First, as plaintiffs are aware, the Consulate General has resumed processing of all current immigrant visa cases. Secondly, first-instance screening was completed in Hong Kong this

month. There therefore should be no one in the camps whose claim to refugee status has not been evaluated at least once. Even if such an individual were to choose to remain in Hong Kong to pursue any still-available avenues of appeal, the Consulate General would continue to process the immigrant visa application.

10. As I have noted previously, the Consulate General readily confirms the existence of U.S. relative relationships and pending immigrant visa cases of those in the camps to the Hong Kong Government. Even as we continue to process the cases that are "current" (those that have no priority dates, or dates that have been reached), however, the United States cannot directly prevent the involuntary repatriation to Vietnam of any Vietnamese in Hong Kong. In order to attempt to forestall their repatriation, the only available option open to the United States is to make a diplomatic demarche to the Hong Kong Government, requesting that it not repatriate Vietnamese in whom we have an interest due to relative relationships with U.S. citizens or permanent residents. More than one such demarche was made with regard to the beneficiaries of U.S. immigrant visa petitions who had been scheduled to depart on the March 8 Orderly Return Program flight to Vietnam. The Hong Kong Government ultimately decided not to repatriate these individuals. We have no assurances that this decision constituted a precedent in future cases.

11. Under penalties of perjury, I affirm that the foregoing statements are true and correct to the best of my knowledge and belief.

_____

Wayne S. Leininger

March 31, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 94-0361 (SHH)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, ("LAVAS"), ET AL., *Plaintiffs*,

v.

DEPARTMENT OF STATE, ET AL., *Defendants*.

SUPPLEMENTAL AFFIDAVIT OF BRUNSON MCKINLEY

1. I submit this affidavit as a supplement to my previous affidavit of March 15, 1994, submitted in this proceeding. I have reviewed the affidavits submitted by plaintiffs in this case on March 30, 1994, with their opposition to defendant's motion to dismiss and for summary judgment, including the supplemental affidavit of Shepard C. Lowman.

2. As the agency responsible for the conduct of United States foreign policy, the Department of State is the lead agency with respect to refugee policy involving aliens outside the United States. The Department of State takes all relevant information into account in deciding what policies to pursue, weighing the accuracy of the information available and forming its own foreign policy judgments as to what course the United States should pursue. It does this in close consultation with the National Security Council, the Immigration and Naturalization Service, and other interested government entities. It also consults from time to time with

interested members of Congress, and conducts annual formal consultations with Congress concerning the refugee admissions program, as required by Section 207 of the Immigration and Nationality Act. In addition, because the situation of South East Asian asylum seekers is of interest to a wide spectrum of the American public, the Department frequently consults with various private interest groups about refugee policies it is pursuing or thinking of pursuing. A wide range of views is often expressed, and the foreign policy adopted by the Department with respect to refugees sometimes leaves some private groups dissatisfied.

3. Several of the affidavits submitted by plaintiffs on March 30, including most notably the supplemental affidavit of Mr. Lowman, speak to core foreign policy issues that have long been the subject of discussion between the Department of State and U.S. refugee advocacy groups, including the groups with which Mr. Lowman is now associated. (See, *e.g.*, the InterAction position paper, Attachment 1.) The views expressed in these discussions have been weighed by the Department of State in deciding what policies to adopt with respect to the situation of Vietnamese asylum seekers in South East Asia and Hong Kong. The foreign policy issues involved have similarly been considered by the governments participating in the CPA and by the U.N. High Commissioner for Refugees. The views of the governments, including the United States, are reflected in the consensus statement of the CPA Steering Committee adopted on February 14, 1994, attached as Attachment 2. This statement resulted from the Fifth Steering Committee meeting referenced in paragraph 7 of my prior affidavit. (I should note here that paragraph 3 of my prior affidavit erroneously suggests that Cambodia is a participant in the CPA; in fact, the CPA expressly reflects that the issue of Cambodian (Khmer) refugees will be handled separately.)

4. The policy debate regarding asylum seekers in South East Asia and Hong Kong has centered largely on two issues: the efficacy of the refugee screening process in various countries of first asylum and the appropriateness of involuntary repatriation. Material to the second question are one's perceptions of conditions in Vietnam. Views of these conditions and, correspondingly, of involuntary repatriation differ: some believe that conditions in Vietnam are no worse than in many other countries and that Vietnamese who have arrived illegally in countries like Hong Kong should be expected to return; others have very negative images of conditions in Vietnam and oppose any forcible return of the Vietnamese.

5. I outline this debate in an effort to explain that Mr. Lowman represents one of many points of view that are ordinarily weighed by the Department of State in deciding what foreign policy to pursue. It appears from plaintiffs' affidavits and other filings that plaintiffs oppose any involuntary return of the Vietnamese, or at least of Vietnamese who are beneficiaries of immigrant visa petitions. As explained in my March 15, 1994, affidavit, the United States is now officially on record as not opposing the involuntary return program of Hong Kong. This position represents a change in U.S. foreign policy since the CPA was adopted in 1989. At that time, the United States conditioned its support for the CPA on an understanding that the screened-out Vietnamese would not be required to return to Vietnam involuntarily, but did not rule out the possibility of supporting involuntary repatriation in the future. As noted in paragraphs 7 and 8 of my prior affidavit, the United States agreed at the CPA steering committee meeting of February 1994, that it would no longer object to Hong Kong's involuntary return program, but that it would not like to see involuntary return programs extended to

other countries for the time being. (See the Statement of Warren Zimmermann attached hereto as Attachment 3.) The United States further said, however, that it would review its position on other involuntary return programs at the end of 1994.

6. The change in U.S. policy toward involuntary return reflects a number of considerations. Included among them are the following factors: (1) the Department of State believes that conditions in Vietnam have continued to improve, as noted by the former Director of the Bureau for Refugee Programs, Warren Zimmermann, in his statement to the February 1994 CPA Steering Committee (Attachment 3); (2) ODP has continued to develop and is now a much more viable avenue for emigration from Vietnam than it was in December 1990, when the Department sent the cable attached to Mr. Leininger's affidavit of March 15, 1994, as Attachment 2 and discussed at length in Mr. Lowman's Supplemental Affidavit (90 State 422906). (In reference to the statement made in paragraph 16 of my prior affidavit concerning use of ODP by returnees, I should clarify that, while it would take 3-4 months to be interviewed and approved for a visa, additional time would be required to complete exit formalities. As stated by Mr. Charles Neary in paragraph 4(viii) of his affidavit of April 4, 1994, the total time from return to exit may be 6-12 months.)

7. I have read and considered the statements of Mr. Lowman in paragraphs 10—12 of his supplemental affidavit to the effect that third country resettlement of the screened-out will not have a detrimental effect on repatriation efforts. Ms. Anne Wagley in her affidavit also submitted by plaintiffs appears to take a similar view, based on observations several years old. It is in fact difficult to separate out the many factors that influence the

Vietnamese asylum seekers who have been screened out. Nevertheless, as stated in my prior affidavit, there is a real concern among the governments participating in the CPA and representatives of the U.N. High Commissioner for Refugees that resettlement of the screened-out will have a negative impact on voluntary repatriation. It is for this reason that the Department of State will have to monitor carefully the effects of its recent decision to attempt immigrant visa processing of the screened-out.

8. U.S. refugee policy in South East Asia and Hong Kong, including its policy with respect to resettlement of screened-out asylum seekers, has been and is likely to remain complex and must respond to changing circumstances. This issue involves delicate foreign policy judgments and bilateral relationships, and therefore must continue to be handled with the utmost care within the current foreign policy context.

I declare under penalty of perjury that the above statements are true to the best of my knowledge and belief.

_____

Brunson McKinley

April 5, 1994

INTERACTION
American Council for Voluntary International Action

September 3, 1993

Ambassador Warren Zimmermann
Director
Bureau for Refugee Programs
US Department of State
Washington, D.C. 20520

Dear Ambassador Zimmermann,

It is our understanding that the Steering Committee for the Comprehensive Plan of Action (CPA) for the treatment of Vietnamese boat people will meet early next year to review the CPA program and to discuss next steps as we near the end of the screening process. We further understand that interested delegations may be participating in preparatory discussions for this meeting during the UNHCR EXCOMM meeting in early October. We believe that this is a critical point in the implementation of the CPA and wish to present the following recommendations with respect to the U.S. approach to these meetings.

United States Role in the CPA

It has been our strong impression that, the United States has played a relatively passive role in the later stages of implementation of the CPA except for its direct obligations under the CPA such as financial contributions and the resettlement in the United States of its share of the boat people identified as refugees in the screening process. However, the success of the Indochinese program as a major humanitarian venture was largely due to United States leadership. As the CPA, and the program itself, draws to an end, we believe that it is vital that the United States once again engage itself

actively in shaping the final act of the CPA and assuring that it conforms with the standards of humanity and concern for this population that guided our earlier efforts.

Screening Coming to an End

The screening process is now coming to an end. All but several thousand applicants already have been screened and most appeals are expected to be completed within a year. While many of us have concerns about the screening process, all of us acknowledge that the CPA prescribes that third country resettlement will not be available to those screened out. There are certain egregious cases which we would hope to bring to your attention, and we would urge that the UNHCR authority to mandate such cases be extended to all CPA first asylum countries. Except for such extreme cases, however, there remain approximately 75,000 persons most of whom will eventually have to return home to Vietnam. Regardless of the correctness of their screening decisons, a large number of these people feel strongly that they would be in jeopardy if they return to Vietnam. Others have invested both material resources and a significant portion of their lives in an attempt to achieve resettlement. They will not be brought easily to a decision to return home.

Forcible Measures Are Counterproductive

The only government to date to engage in forcible repatriations is the United Kingdom with respect to small numbers of refugees forcibly returned from Hong Kong. Other first asylum nations and the UNHCR, however, have taken a wide variety of measures which make life more difficult in the camps. Rations have been cut, access to outside markets reduced, freedom of movement more closely circumscribed and social services eliminated or restricted. Unacceptable crowding, once dictated by an overwhelming flow of boat people, has

been perpetuated by transfers and camp closings. Many of these measures appear to have been taken to press the boat people to accept repatriation; often this reasoning is explicitly and publicly stated.

During the years of the boat people crises, the NGOs, in their partnership with the Department of State, played an important role in advocating for the Vietnamese boat people and bringing them to the United States. Whatever one says about screening or current conditions in Vietnam, at the time of their departure from their homeland the present residents of the camps had compelling reasons to leave—economic or otherwise. With the implementation of the CPA, however, they found themselves caught by a sea change in public policy. The logical conclusion to the CPA process is for NGOs and the US Government to continue their partnership and assist those individuals who have been found ineliegible for third country resettlement to return home in a peaceful and dignified manner.

We also believe that the present course of action is counterproductive. It sets up a confrontational mode between the boat people and their keepers and casts the question in the boat people's mind as whether to accept repatriation or resist it. These actions all register in the minds of the boat people as actions taken by those hostile to their interests to force them to return to Vietnam; thus, reinforcing their belief that return is not in their best interest. It is probably correct that for some of those leaning towards returning home anyway, especially recent arrivals in the camps, such coercive measures will encourage voluntary returns, but many of these have already gone home.

For the remainder, who are more inclined to resisting being forced home, none of these harsh measures are likely to persuade them to accept repatriation. Their

response, so far has been to resist with the only means at their dispoal. Already there have been suicides and attempted suicides, hunger strikes, protests, riots and growing levels of camp violence. This can only be the tip of the iceberg if active measures to force their return continue. This would be a tragic ending to what has been a great and extraordinarily successful humanitarian effort over the past 18 years. And it need not be. If NGOs and governments commit themselves to working together to implement a Peaceful Return Home program, this long effort can be brought to an humane and expeditious conclusion.

A Peaceful Return Home

If forcible return could cease and the coercive measures now being implemented could be rolled back, the agencies would be prepared to join in educating this population in the nature of the choice that faces them. While few of us would directly advise these people to return home, leaving that decision to them, we would help to make it clear that their choice is not a longer wait for resettlement but a longer wait for a return home. Their judgment must be: are they now better off at home or in a refugee camp? We believe our role will help in shaping this choice and that, as they face such a decision in a non-coercive setting, a steady and growing number of the boat people will choose return, without the trauma that surely faces us all if the present course is continued. We urge the Department to accept this principle, and a partnership on this issue with the NGOs, as the linchpin of United States policy in the intergovernmental talks on the CPA to be held in the coming months.

If there could be a monitoring program with adequate funding and the necessary access, the American NGOs would be prepared to second personnel to such a moni-

toring effort. If funding is available, we would also be prepared to assist in programs to ease the reintegration of these people in their home society.

Attached is a more detailed set of recommendations as to how a peaceful return home for the boat people might be implemented. These have been endorsed by the below listed agencies. Additional organizations are currently reviewing the recommendations and may add their endorsement to the list. In the meantime, we would very much look forward to an opportunity to discuss these with you in a timely fashion.

Sincerely,

Donald N. Hammond, Chair
Committee on Migration and
Refugee Affairs
Director, US Ministries
World Relief

On behalf of:

The American Refugee Committee
Church World Service, Immigration
and Refugee program
Episcopal Migration Ministries
Hebrew Immigrant Aid Society
Indochina Resource Action Center
International Catholic Migration
Commission
International Rescue Committee
Jesuit Refugee Services
Lutheran Immigration and Refugee Services
Refugees International
US Catholic Conference, Migration
and Refugee Services
US Committee for Refugees

STATEMENT BY THE FIFTH STEERING COMMITTEE OF THE INTERNATIONAL CONFERENCE ON INDO-CHINESE REFUGEES
(Adopted on 14 February 1994)

Reaffirmation of the CPA

1. The Steering Committee met on 14 February 1994 and reviewed all aspects of the Declaration and Comprehensive Plan of Action approved by the International Conference on Indochinese Refugees held at Geneva, Switzerland, on 13-14 June 1989.

2. The Steering Committee reaffirmed the fundamental principles underlying the Comprehensive Plan of Action, in particular the discouragement of clandestine departures, the regular departure programmes, the refugee status determination procedures, the resettlement of those determined to be refugees and the return to their country of origin of persons determined not to be refugees in accordance with international practices reflecting the responsibilities of states towards their own citizens.

3. The Steering Committee recognized the significant progress made under the CPA since the last Steering Committee meeting, noting that the total number of Vietnamese residing in camps in the region had dropped from some 120,000 persons at the inception of the CPA to some 60,000 persons as of this date. However, despite the fact that over four years have elapsed since the adoption of the CPA, the population in the camps in the region remains large and represents a heavy burden both to first asylum countries and to the international community as a whole. Recognizing the achievements of the CPA, the Steering Committee nevertheless concluded that new initiatives were needed particularly to increase the rate of repatriation and bring the CPA to an early and successful conclusion.

4. The Steering Committee called upon all members urgently to address outstanding issues, as described below, in order to provide appropriate durable solutions for all concerned and to bring various activities and programmes under the CPA in first asylum countries to an early conclusion with a target of the end of 1995 or earlier where possible.

In this context, the Steering Committee noted that the Governments of the Socialist Republic of Viet Nam and the Lao Peoples Democratic Republic have agreed to make every effort, in cooperation with the International Community to enhance capacities to receive returnees from first asylum countries by the end of 1995.

Clandestine Departures

5. The Steering Committee welcomed the very significant decline in the departure of Vietnamese asylum-seekers to countries in the region over the past two years. While noting that a very small number of persons continue to make their way to certain first asylum countries, the Steering Committee reiterated its view that clandestine departures should be discouraged and that measures should continue to be taken against those organizing clandestine departures. In this regard, the Steering Committee called upon UNHCR, the Socialist Republic of Viet Nam as well as intergovernmental and non-governmental organization, to continue their public information activities, both inside and outside Viet Nam for the purpose of discouraging clandestine depatures.

Regular Departure Programmes

6. The Steering Committee reaffirmed its strong support for regular departure programmes, which provide the safest and most appropriate means of seeking migration from Viet Nam. The Steering Committee welcomed the considerable success of regular departure programmes from Viet Nam which have enabled the migration of more than 300,000 persons since the CPA went into effect. The Steering Committee recognized the importance these programmes have had in reducing the number of clandestine departures and expressed appreciation for the sustained efforts made by the country of origin and the receiving countries in facilitating direct departures. The Steering Committee called upon Governments as well as the International Organization for Migration (IOM) to continue providing the necessary facilities to enable individuals eligible under the various programmes to depart for family reunification or for other legitimate purposes. The Steering Committee also called upon Governments to facilitate where appropriate the return and subsequent migration of eligible non-refugees in accordance with national criteria.

Reception of New Arrivals

7. While recognizing that the number of new arrivals had dropped dramatically over the past two years, the Steering Committee expressed appreciation to those first asylum countries and territories in the region which, in the framework of the CPA, have continued to grant temporary asylum.

Status Determination Procedures

8. The Steering Committee noted the considerable progress made in carrying out refugee status determination procedures throughout the region. The Steering

Committee welcomed the completion of status determination procedures in the Philippines and Indonesia, and expressed appreciation for the steps undertaken by remaining first asylum countries and territories towards the earliest possible completion of the refugee status determination procedures.

9. The Steering Committee expressed the view that status determination throughout the region had been carried out in accordance with established refugee criteria. The Steering Committee emphasized that with the completion of first instance determinations, followed by a review upon appeal, there would be no further review under CPA procedures of determinations made.

10. The Steering Committee declared that, as a result of changing circumstances within the country of origin, screening procedures under the CPA should no longer be applicable to Vietnamese arriving in first asylum countries after 14 February 1994. Vietnamese arriving after the above date will be treated in accordance with national legislations and internationally accepted practices.

11. The Steering Committee took note of the progress achieved in the work of Special Committees in reviewing the situation of unaccompanied minors and called on Governments concerned and UNHCR to bring this work to a conclusion by mid-1994.

Resettlement

12. The Steering Committee expressed satisfaction at the success of the programme for the resettlement of the pre-cut-off date camp population which, since the inception of the CPA, has enabled the resettlement of all but 1,800 of these persons. In the spirit of burden sharing and in accordance with the principle of fulfilling respective responsibilities under the CPA, the Steering

Committee appealed to all countries to provide early humane solutions for those refugees who have remained for long periods of time in camps. With regard to the post-cut-off date refugees, the Steering Committee noted that progress had been made but appealed to all concerned countries to strengthen their efforts towards the early resettlement of those who have been determined to be refugees. Recognizing the complexity of the issues involved, the Steering Committee agreed that a technical meeting be held as early as possible in 1994 in order to discuss practical steps to resolve outstanding issues and in particular the situation of those refugees who have been in camps for an extended period of time.

Repatriation/Plan of Repatriation

13. The Steering Committee noted with appreciation that some 60,000 Vietnamese had returned voluntarily to their country of origin since the beginning of the CPA and that the terms of the Memorandum of Understanding signed between Viet Nam and UNHCR on 13 December 1988 have been adhered to. The Steering Committee recognized that considerable efforts have been made by the country of origin at the central and local levels in receiving the returnees and transporting them to their towns and villages of residence. The Steering Committee also expressed appreciation for the efforts made by the Vietnamese authorities in facilitating UNHCR's monitoring responsibilities which has enabled UNHCR to have regular access to individuals and their families following their return. The Steering Committee noted that the reintegration programme had been successful and that returnees have been able to resume normal lives with the assistance of UNHCR, the European Community's International Programme, bilateral donors and non-governmental organizations.

14. The Steering Committee noted, however, that over some 60,000 Vietnamese remain in first asylum countries, a great majority of whom have been determined not to be refugees and that many of those remaining have not yet volunteered to return. The Steering Committee endorsed the decision taken by UNHCR to reduce the amount of individual reintegration assistance at this stage from US$ 360 to US$ 240 for those who had not volunteered prior to 1 November 1993, or within three months of having received final status determination, and called upon UNHCR to keep under review the possibility of further reductions in the level of individual reintegration assistance.

15. While noting the success of voluntary repatriation and the continued need to promote it, the Steering Committee nevertheless expressed the feeling that additional arrangements were now appropriate to expedite the return of all non-refugees from camps in the region in accordance with internationally accepted practices as provided for under paragraph 14 of the CPA.

16. To this effect, the Steering Committee took note of the Orderly Return Programme (ORP) in Hong Kong agreed upon on 29 October 1991, and recognized that orderly return programmes can have a beneficial impact on the voluntary repatriation programme. The Steering Committee also noted that a Memorandum of Understanding on principles and arrangements relating to returning Vietnamese non-refugees from Indonesia had been reached on 2 October 1993 and welcomed the readiness of the Government of Viet Nam to undertake, at the earliest opportunity, negotiations with other countries in the region with a view to reaching similar agreements on the return in safety and dignity of all non-refugees with appropriate international assistance for their re-integration. The Steering Committee called

upon UNHCR to participate in the process of orderly return to the maximum possible extent in accordance with its role as designated by the Secretary-General and its mandate.

17. The Steering Committee expressed confidence that through voluntary repatriation, together with orderly return programmes, the return of all non-refugees from first asylum countries could be accelerated to meet the target date of end 1995.

18. The Steering Committee welcomed the information provided that the reception capacities of both the Hanoi and Ho Chi Minh City transit centres have been recently substantially increased reaching a transit capacity adequate for the repatriation target. In this connection, the Steering Committee also noted with appreciation the efforts undertaken by the country of origin to increase the frequency of visits by interviewing delegations to first asylum countries and the flexibility shown in considering late applicants for voluntary return. The Steering Committee urged that procedures for the implementation of orderly return programmes be kept as simple as possible and that the processing of lists and biodata submitted under these programmes be carried out quickly to permit an early return of those who have not volunteered.

19. The Steering Committee noted with satisfaction that, based on its monitoring activities in Viet Nam, UNHCR has found no substantiated reports that any of the 60,000 returnees have suffered ill treatment on return. The Steering Committee reaffirmed that the treatment of returnees should continue to be consistent with the guarantees and undertakings provided in the Memorandum of Understanding between the Socialist Republic of Viet Nam and UNHCR of 13 December 1988. In view of the expected increase in the rate of

returns, the Steering Committee called upon UNHCR to increase its monitoring capacity according to needs and to continue its reintegration assistance to all returnees in Viet Nam without distinction as to the programmes under which they return.

Public Information Campaign

20. The Steering Committee recognized the importance of reliable and accurate information for public awareness and understanding of the objectives of the CPA and to enable non-refugees to understand better the alternatives available to them. The Steering Committee agreed that a renewed and effective information campaign be continuously inplemented in order to increase the understanding among all agencies and individuals involved of the objectives and mechanismes of the CPA and to emphasize the need for an early repatriation of the non-refugees remaining in camps in the region. The Steering Committee also encouraged all parties concerned to conduct regular public information campaigns.

Care and Maintenance

21. The Steering Committee noted that, with the decline in the number of persons in first asylum camps, and taking into account the scarcity of financial resources, there was a need for UNHCR to standardize and adjust assistance provided in camps in the region and to rationalize non-essential assistance to the camp population as a whole, at the same time emphasizing that essential services to maintain health and well-being will continue in all camps.

EC Reintegration Assistance

22. The Steering Committee welcomed the European Community's International Programme (ECIP) for the

repatriation and reintegration of Vietnamese and regards that programme as having been a major step towards achieving a durable and comprehensive solution to the problem of Vietnamese asylum-seekers. The Steering Committee noted that a large number of returnees, together with local populations, had been able to benefit from credit schemes, vocational training and employment-generating projects which had enabled them to assume productive livelihoods in Viet Nam. The Steering Committee strongly encouraged international donors to contribute sufficient funds to ensure that the ECIP was enabled to keep pace with the accelerated rate of reintegration. The ECIP is due to end on 1 December 1994 but the Steering Committee noted that the revolving credit fund would remain active for three years after the completion of the programme in the provinces where the programme operated. In the meantime, the ECIP and other contributions to the re-integration of Vietnamese returnees should be given wide publicity, both in Viet Nam and in first asylum camps, to encourage asylum-seekers to return home prior to completion of these programmes in order to receive maximum benefit from the assistance provided.

Unaccompanied Minors

23. The Steering Committee noted with satisfaction that over 4,000 unaccompanied minors had returned to Viet Nam, including some 180 who had been processed under the family reunification programme. The Steering Committee welcomed the agreement reached on simplified procedures under the family reunification programme for those minors for whom Special Committees had decided it was in their best interest to return. The Steering Committee expressed concern, that despite these simplified procedures, considerable time was often required before the minors were cleared to return and,

in light of the adverse effects on the unaccompanied minors of prolonged stay in the camps, called upon the country of origin to expedite clearance to the maximum extent possible. The Steering Committee also called upon UNHCR to intensify its efforts to encourage the return of the remaining unaccompanied minors, and to assist governments in implementing the family reunification programme before the end of 1994 on a continuous basis, in cases where Special Committees had determined that it was in the minors' best interest to return.

24. The Steering Committee expressed appreciation for the valuable role undertaken by Nordic Aid to Returned Vietnamese (NARV) in the care and reintegration of unaccompanied minors. The Steering Committee felt that NARV had played a crucial role, together with UNHCR, in carrying out home assessments, strengthening community activities, building educational facilities, visiting returnee minors and helping in their reintegration process. The Steering Committee noted that almost all returned unaccompanied minors had joined their families, or extended families, and had resumed normal lives. The Steering Committee noted that a large number of unaccompanied minors still remain in the camps in the first asylum countries and encouraged UNHCR and NARV to continue to provide adequate monitoring and re-integration assistance until the end of 1994.

Laotian Asylum-Seekers

25. The Steering Committee took note of the results of the Sixth Tripartite Thai-Lao-UNHCR Meeting in Savanakhet, Lao People's Democratic Republic, from 15 to 16 July 1993 on the repatriation of Lao refugees and asylum seekers. The Steering Committee urged all parties concerned to reinforce efforts for the return and

reintegration of Laotian refugees and asylum-seekers from Thailand and other neighbouring countries and called upon UNHCR to coordinate with donor countries as well as international development agencies and NGOs to increase the capacity of the Lao People's Democratic Republic to absorb a higher number of returnees. In this context, the Steering Committee welcomed the recent decision of the Government of the Democratic Republic of Laos and the European Community to start a new re-integration programme for returnees in the Bokeo province in close cooperation with UNHCR.

Implementation and Review Procedures

26. The Steering Committee expressed deep appreciation for contributions made by the donor community towards UNHCR's 1992 and 1993 CPA programmes and called upon the donor community to ensure that UNHCR's 1994 and 1995 CPA programme budgets are fully funded. The Steering Committee noted with concern that the Government of Hong Kong has incurred expenses of over US$100 million for the care and maintenance of asylum-seekers in Hong Kong which remain uncovered and called upon donors to contribute to the Hong Kong programme.

27. The Steering Committee expressed appreciation for the convening by UNHCR of an informal meeting of the Steering Committee in Ho Chi Minh City on 27 April 1993 at which time members were informed of progress achieved under the CPA as of that date. The meeting also expressed appreciation to UNHCR for having convened in Geneva on 30 November 1993, a Preparatory Meeting for the Fifth Steering Committee meeting.

28. The Steering Committee called on UNHCR to

continue to coordinate the implementation of the CPA. The Steering Committee requested UNHCR to report further on progress made towards the completion of various activities under the CPA. The Steering Committee decided it would meet again at an appropriate time, to be worked out by the Chairman in consultation with Steering Committee members, to ensure the successful completion of the programmes by the target date of end 1995. In the interim, UNHCR should convene technical meetings, in the region as it deems appropriate to enhance the implementation of specific elements of the CPA.

Statement by Warren Zimmermann
Head of the U.S. Delegation
At the Fifth Meeting of the Steering Committee
of the International Conference
On Indo-Chinese Refugees

Geneva, February 14, 1994

Mr. Chairman:

The United States Delegation welcomes the language of the Steering Committee statement we have just approved and the words we have heard on the floor this morning to the effect that this Comprehensive Plan of Action (C.P.A.) should end with as much speed and dignity as possible by the end of 1995.

As the C.P.A. ends, it is important to emphasize the principle of voluntary return, which has been the dominant principle since the beginning. The statement underlines the replication of "non-objector" programs—that is, programs that do not use force—and we desire to see that C.P.A. member states continue to fashion return programs in coordination with UNHCR, as called for in the Steering Committee statements.

However, if the voluntary approach does not prove completely successful, we will have to move to "additional arrangements" as provided in our statement. The United States government does not in principle oppose mandatory return of screened-out non-refugees in accordance with international law and practice, when necessary, as a supplement to the preferred solution of voluntary returns. However, we believe that, for the time being, mandatory return should not be extended beyond its present application. The Steering Committee

statement calls for increased efforts to encourage voluntary return as well as other alternatives that do not contemplate the use of force, and we believe these should be given time to work. We will, of course, continue to monitor the situation and be prepared to review this important issue at the end of 1994.

We believe this approach is the fairest in making clear to the people in camps who have been found not to be refugees that voluntary return to Vietnam is their best option and that there is no possibility of resettlement or of remaining in the camps indefinitely. Moreover, conditions in Vietnam have improved considerably, as evidenced by the 60,000 Vietnamese who have chosen to return. Our own bilateral relationship with Vietnam—including the lifting of the embargo and the decisions to open liaison offices—should also contribute to voluntary return.

Mr. Chairman, we support your statement regarding paragraph 10 of the Statement on Arrangements following the conclusion of the C.P.A. It is also the view of the United States, that new arrivals should be treated like any other asylum seekers, including respect for the principle of non-refoulement. We appreciate those countries that have continued to respect first asylum, and we urge that this critical principle be respected in the future.

Thank you.

UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-0361 (SSH)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*

v.

UNITED STATES DEPARTMENT OF STATE, ET AL., *Defendants.*

AFFIDAVIT OF CHARLES NEARY

I, Charles Neary, declare as follows:

1. I am a Foreign Service Officer assigned to the United States Embassy in Bangkok, Thailand. My principal duties are as a Consular Officer attached to the U.S. Orderly Departure Program (ODP). To fill those duties, I travel regularly to Vietnam to conduct interviews of Vietnamese applicants seeking to immigrate to the United States. Prior to taking this assignment, I received 44 weeks of training in the Vietnamese language, enabling me to conduct interviews in Vietnamese. A native Vietnamese speaking interpreter is usually present at the interviews to avoid any misunderstandings.

2. Since my arrival in Thailand in August 1992, one of my specific duties has been to promote and monitor voluntary repatriation from countries of first asylum of Vietnamese nationals eligible to migrate to the United States. In furtherance of that duty, I have traveled to camps for asylum seekers in Thailand, Malaysia, Singapore, Indonesia, the Philippines and Hong Kong. I

have held group meetings with asylum seekers in Malaysia and Indonesia and conducted individual counseling sessions with ODP eligible applicants in all of the aforementioned countries.

3. During these meetings I have drawn on my personal knowledge of the procedures for asylum seekers who elect voluntarily to return to Vietnam in order to pursue their applications through ODP. I have informed eligible applicants that, should they return to Vietnam, ODP will track their movements and I will arrange to conduct their immigrant visa interview in Vietnam myself. Since my arrival, I have conducted interviews for almost all applicants for immigration status who have voluntarily repatriated from countries of first asylum. I have conducted several hundred such interviews, often meeting with returnees. I had previously counseled in the country of first asylum.

4. Based on my personal experience and discussions with officials of the office of the United Nations High Commission for Refugees (UNHCR), ODP eligible returnees undergo the following proceedures when returning to Vietnam under the voluntary repatriation program

(i) On departure from the country of first asylum, adult returnees receive $50 from UNHCR.

(ii) Returnees originally from the southern part of Vietnam arrive at Tan Son Nhat airport, surrender their laissez-passers and travel directly to a reception center located at Thu Duc, north of Ho Chi Minh City. I have personally observed procedures at the airport and at Thu Doc. Returnees originally from the northern and central parts of Vietnam return to Hanoi's Noi Bai airport before going to a reception center.

(iii) At the reception centers, returnees are issued a certificate by UNHCR identifying them as voluntary returnees ("Giay Hoi Huong"). Returnees spend from one to three days at the reception centers before returning to their homes. UNHCR provides transportation as necessary. Since September 1, 1993, adult returnees have at this time received an additional $240 from UNHCR. (Prior to that, the resettlement allowance was $360.)

(iv) Returnees present their Giay Hoi Huong to the local authorities in their home area in order to register their names of the Family Register ("Ho Khau").

(v) Meanwhile, ODP, having been informed of the applicant's return, ensures that the file is documentarily complete and schedules an early interview, usually for the next available interview session in which I am scheduled to participate.

(vi) Returnees apply for exit permission using their Giay Hoi Huong and Ho Khau.

(vii) If the files are documentarily complete, interviews generally take place within 3-6 months after return. When returnees appear for their interviews, in addition to determining eligibility criteria as for other applicants, I routinely ask a series of questions about the experience of the voluntary repatriation process. These questions include, but are not limited to, whether the returnees encountered any difficulties with local or national authorities in getting the required documentation or otherwise and whether any fees were solicited by those authorities. In a small minority of cases, applicants have reported having to pay $4-6 for registration to Ho Khau. A larger minority reports that they have not yet received their exit permits. The External Relations Service of the Vietnamese Foreign Ministry

has cooperated in waiving the normal requirement for pre-issuance of exit permits for applicants who are returnees. Where necessary, I write a letter of introduction to approved applicants in order to facilitate issuance of their exit permits.

(viii) Approved applicants undergo medical examination and wait to be manifested on a flight for the United States. These procedures generally take from 3 to 6 months. This means that the process from return to Vietnam until departure for the United States takes from 6 to 12 months.

5. Based on my interviews of hundreds of returnees, conducted both with and without the presence of an interpreter, I am satisfied that the Vietnamese Government has no policy of discriminating against or extorting funds from returnees. By way of example, following her return to Vietnam, a returnee who acted as interpreter for me in Malaysia was able to find employment at the Saigon Business Center while waiting for her interview and departure. I am also satisfied that ODP is able to schedule eligible returnees for interview and that they are able to appear for those interviews and depart for the United States if approved.

6. I have read the declaration of Minh Hai regarding the circumstances of his brother Nguyen Ngoc Son. I am in possession of the ODP file relating to Mr. Son's case. The information in title confirms that Mr. Son returned to Vietnam on December 30, 1993. On February 8, 1994, ODP sent Mr. Son a letter of introduction to assist him in securing an exit permit from the Vietnamese authorities. The file is silent as to when Mr. Son may have made any request for exit permit or the result of any such request. I would note, however that because a letter of introduction is generally required in

order to obtain an exit permit, if Mr. Son made his application without the letter of introduction, that may explain why he did not obtain his exit permit at that time. On February 1 and February 16, ODP wrote to Mr. Son's wife, Ms. Annette Ferguson, requesting submission of an affidavit of support in order to complete the file. To date, ODP has received no response to that request. Notwithstanding the lack of an affidavit of support, ODP has included Mr. Son's name on a list of persons to be submitted to the Vietnamese Government with a request that they appear for interview. This was done prior to receipt of Minh Hai's declaration.

7. While I have no knowledge of any difficulties encountered by Mr. Son in obtaining his exit permit, I personally know of three cases in which applicants who have concluded marriages outside Vietnam have been interviewed and approved. Moreover, on March 31, 1994, after reading Minh Hai's declaration, a U.S. Orderly Departure Program officer who was presently in Vietnam asked the head of the office within the Vietnamese Foreign Ministry that handles ODP whether the Vietnamese Government would issue exit permits based on marriages entered into outside Vietnam. He advised that exit permits would be issued on the basis of such marriages, even if they occurred in first asylum camps in Hong Kong. The Foreign Ministry official also said that, while marriages by Vietnamese outside Vietnam are not automatically recognized under Vietnamese law, such marriages in fact receive de facto recognition. To the best of my knowledge and belief, no ODP eligible applicants have been denied an interview based on the lack of a Vietnamese marriage certificate. With regard to Mr. Son, ODP will continue to seek an early interview to determine his eligibility to emigrate to the United States. In view of the public charge provi-

sions of section 212(a)(4) of the Immigration and Nationality Act, it will be difficult to approve his application, however, before receiving the affidavit of support from his wife.

8. I note that Minh Hai in his affidavit states that his brother, Mr. Son, told him that the U.S. Consulate told him (Mr. Son) "that he must return to Vietnam within 90 days if he wishes to apply for departure from Vietnam through the ODP." This confused hearsay statement makes no sense, as it is simply untrue that Vietnamese in first asylum camps in Hong Kong must return to Vietnam within any particular time period in order to have their immigrant visa applications processed through ODP. When a Vietnamese who is approved for an immigrant visa through ODP has relatives in first asylum camps who ordinarily would travel with that Vietnamese as part of the same family unit (i.e., beneficiaries of the same petition), the departure of the approved Vietnamese from Vietnam for the United States is deferred for 90 days to provide the relatives in first asylum an opportunity to return to Vietnam and travel with the approved relative. If the individual in first asylum does not return to Vietnam within those 90 days, the family member in Vietnam is "released" to travel to the United States without the individual in first asylum. This would not be applicable to someone like Mr. Son, insofar as his immigrant visa application depends on the petition of his U.S. citizen wife. Moreover, there is no reason why the spouse of a U.S. citizen would have to apply for an immigrant visa within 90 days of any particular event.

9. Based on my knowledge of procedures for ODP eligible returnees, I am satisfied that they face no undue hardships upon their return to Vietnam. In fact, return to Vietnam removes returnees from the hardships of the

camps described in the declaration of Thu Hoa Thi Dang. This would not be applicable to someone like Mr. Son, insofar as his immigrant visa application depends on the petition of his U.S. citizen wife. Moreover, there is no reason why the spouse of a U.S. citizen would have to apply for an immigrant visa within 90 days of any particular event.

10. To my knowledge, the Vietnamese returned to Vietnam involuntarily have not yet included any Vietnamese eligible for the U.S. Orderly departure Program. Involuntary returnees do not receive assistance from UNHCR. I have no reason to think however, that any involuntarily returned Vietnamese eligible for ODP would have any difficulty pursuing an immigrant visa application after returning to Vietnamese. There is no indication that the Vietnamese Government treats involuntary returnees any differently than voluntary returnees in respect to matters relevant to immigrant visa processing. Moreover, the Vietnamese Government is a party to the Comprehensive Plan of Action which reflects in Section B the Vietnamese Government's commitment to facilitating departures through ODP and in Section F its commitment not to persecute returnees.

I declare, under penalties of perjury of the laws of the United States, that the foregoing statements are true and correct to the best of my knowledge and belief.

_____
Charles Neary

April 4, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-0361 (SSH)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Defendants*.

DECLARATION OF CATHERINE W. BROWN

1. I am the Assistant Legal Adviser for Consular Affairs in the Legal Adviser's Office of the U.S. Department of State. In this capacity I provide legal advice to the Department of State concerning immigration matters and was asked to speak with Daniel Wolf, attorney for the plaintiffs in this action, with respect to processing immigrant visa applications of immigrant visa petition beneficiaries in first asylum camps in Hong Kong.

2. I first spoke with Mr. Wolf on Tuesday, February 22, 1994, and advised him that the Department's policy was under review and that we hoped to complete that review by the end of the week—*i.e.*, by Friday, February 25. On Wednesday, February 23, 1994, I sent Mr. Wolf by facsimile transmission the letter at Attachment C confirming that this review was taking place and that we hoped it would be completed by the end of the week. The letter also advised that the Department was considering sending interim instruc-

tions to the field pending completion of that review.

3. On Wednesday night, subsequent to transmission of the letter at Attachment C, the Department sent all South East Asian processing posts the cable at Attachment A, which shows that it was transmitted shortly after midnight (0414 Zulu time) on February 24. This is the interim instruction referred to in my February 23 letter.

4. On Friday, February 25, 1994, the Department sent all South East Asian processing posts the cable at Attachment B. This cable was completed and delivered to the Department's communications center in the morning, before the Department learned that plaintiffs had filed their temporary restraining order application.

I declare under penalty of perjury that the above statements are true to the best of my knowledge and belief.

_____

Catherine W. Brown

ATTACHMENT A
Civil Action No. 94-0361 (SSH)

EAP/L CARDS CENTER

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10-16 ADS-98 NSAE-90 OIC-92 RP-10 VO-96
FMP-00 /941R
Drafted by: L/HRR:MKLEIN-SOLOMON: MKS
Approved by: L/CA:CWBROWN
RP/A: TRUSCH
RP/AAA:
BFLEMING
CA/VO:DDILLARD (DRAFT)
EAP/CM: DKELLY
L:MSTEINBERG L/CA:VLAIRD
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AMCONSUL HONG KONG
AMEMBASSY KUALA LUMPUR
AMEMBASSY JAKARTA
AMEMBASSY MANILA
AMEBASSY SINGAPORE
AMEMBASSY TOKYO
INFO USMISSION GENEVA IMMEDIATE
AMEMBASSY CANBERRA
AMEMBASSY OTTAWA
AMEMBASSY LONDON

UNCLAS STATE 046562

Geneva for RMA

E. O. N/A

TAGS: CVIS, PREF, VM

Subject: First Asylum IV processing

1. This is an action message. See para 4.

2. Summary. The Department is currently reviewing its policy with respect to consideration of immigrant visa petitions for screened-out Vietnamese asylum seekers in countries of first asylum. During the pendency of the policy review, Department wishes to preserve the status quo. This cable contains instructions for doing so. If there are additional measures that posts believe are necessary to accomplish this objective, please inform Department asap so that authorization can be granted for taking such measures.

3. Background. It has come to the Department's attention that our practice of requiring Vietnamese immigrant visa beneficiaries to return to Vietnam for IV processing through the orderly departure program ("ODP") may be inconsistent with a Department regulation concerning the place of application for IV's. Relevant to a resolution of this issue are the department's continuing interest in promoting adherence to the comprehensive plan of action ("CPA") for Vietnamese and Laotian asylum seekers in South East Asia and the need to discourage continued irregular movements of non-refugees in the region. The Department is currently reviewing the relevant legal and policy issues.

4. Action requested. It would be helpful if, during this review, posts would suspend advising immigrant visa petition beneficiaries that their applications will not be adjudicated in first asylum countries. In addition, we ask that during the period of our review posts use best efforts with host country officials to see that U.S. immigrant visa petition beneficiaries are not involuntarily repatriated, and that any such beneficiaries who may be planning to repatriate voluntarily are informed the review is taking place. The purpose of such notice is to permit these beneficiaries to decide whether to repatriate or to postpone repatriation pending completion of the department's review. Finally, the Department requests that posts bring to its attention any cases where requiring the IV beneficiary to return to Vietnam for processing through ODP may lead or have led to a failure to meet the one year application dealine set forth by INA 203 (G) and 22 C.F.R. 42.83.

5. Department hopes to complete its policy review this week. Posts will be advised of the results. Christopher

ATTACHMENT B
Civil Action No. 94-0361 (SSH)
Unclassified
EAP/L Cards Center

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Origin: (CA 01)
Info: LFOD(01) EAP (02) LPM (01) LFOB (01) LHRR (01)
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Origin 1-00
Info:. LOG-00 AID-88 CA-92 CIAE-00 OASY-00
EAP-00 EUR-00 OIGO-00 TEDE-00 INR-00
INSE-00 10-16 ADS-00 NSAE-89 OIC-82 RP-10
VO-86 FMP-00/841R

Drafted by: L/CA;CWBROWN: CWB
Approved by: L/CA:CWBROWN
RP: POAKLEY
CA: DHOBBS
L/HRR:MKLEINSOLOMON
L/CA: VLAIRDCA/VO/L:CDSCULLY

RP/A:TRUSCH (DRAFT)
EAP/CM:DKELLY
CA/VO:DDILLARD

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AMEMBASSY JAKARTA
AMEMBASSY MANILA
AMEMBASSY SINGAPORE
AMEMBASSY TOKYO
INFO USMISSION GENEVA IMMEDIATE
AMEMBASSY CANBERRA
AMEMBASSY OTTAWA

UNCLAS STATE 048852

Geneva for OMA

E.O. 12356: H/A
TAGS: CVIS, PREF, VM
Subject: First Asylum IV Processing Ref; STE 046562

1. This is an action message.

2. REFTEL advised that Department was reviewing question of processing immigrant visa petitions of beneficiaries in first asylum camps. Dept has concluded that all addressee posts should initiate normal processing of such aliens either by sending them packet 3 per standard procedures or by continuing normal processing after packet 3 is sent by TIVPC. Post should inform most governments of this decision and emphasize that neither the sending of packet 3 nor the actual scheduling of a formal interview for final action constitutes a guarantee on the part of the USG that the alien will be documented for entry into the United States as an immigrant, or otherwise resettled by the United States. Cutoffs must be able to adjudicate the application on the merits and, if the alien does not establish eligibility, deny it. Accordingly, the viability of processing will depend on host governments agreeing to permit IV interviews of those who have not been screened in on the understanding, that applicants may be denied or approved and that if they are denied, the United States will accept no responsibility for their resettlement.

3. Addressee posts should therefore approach host governments and request that applicants be made available for interviews on this basis. If such permission is granted, posts should process those applicants/beneficiaries whose petitions have been current the longest and schedule their interviews, consistent with need to adjudicate posts overall IV workload.

4. Dept is aware of concern that IV processing of persons in first asylum camps who have not been "screened in" will reduce incentives for such persons to return to Vietnam and Laos, unless IV interviews in Ho Chi Minh City would occur considerably sooner. (See ODP query, para. 7 below.) Dept will want to watch this situation closely. Posts therefore should not schedule interviews more than one month in advance. Post should also keep Dept apprised of the impact of this decision on the willingness of persons in first asylum countries to return home.

5. Dept has not repeat not concluded that the policies with respect to IV processing pursued to date were impermissible because of Dept's regulation on where aliens should apply for IV. The Department has concluded that the interpretation of the regulation need not be definitively resolved at this time. It has also concluded that IV petition beneficiaries in first asylum camps should, to the extent possible, have their applications processed where they are physically present while the Department practice on such processing is monitored in light of a variety of factors, including the recent CPA conference in Geneva, lifting of trade sanctions against Vietnam, most government reactions, and the impact of IV processing on repatriation efforts.

6. Posts should advise Dept promptly of whether host governments have granted permission for IV interviews as outlined above and of scheduled interviews. Posts should thereafter keep Dept. fully informed of all relevant developments.

7. For ODP please advise Dept. of your interview schedule in terms of how far in advance you are scheduled for interviews in Ho Chi Minh City. Dept would like to know whether you could offer Vietnamese in first asylum IV interviews in Ho Chi Minh City sooner than they can be scheduled in first asylum countries. Christopher

ATTACHMENT C

Civil Action No. 94-0361 (SSH)

February 23, 1994

BY FAX

Daniel Wolf, Esq.
Hughes Hubbard & Reed
1300 I Street, N.W.
Washington, D.C. 20005-3306

Dear Mr. Wolf:

I appreciated the opportunity to talk with you yesterday about the Department of State's policies with respect to the processing of immigrant visa applications of beneficiaries who are in first asylum camps in South East Asia and have not been found eligible by host government officials and/or the U.N. High Commissioner for Refugees for third-country resettlement as refugees. As I advised you, the Department has this matter under review, and hopes to complete its review by the end of this week.

I am currently communicating with interested bureaus in the Department regarding the issues you have raised and a number of related concerns. In light of your concern that some of your clients may be prejudiced by the passage of time, we are investigating the possibility of sending interim instructions to the field while this matter is under review.

The review process would be facilitated if you were to provide us with more specific information about the frustrations particular aliens have encountered or you believe will encounter as a result of our visa processing

policies. To confirm the information I gave you yesterday: you may fax to me directly at 736-7559.

Sincerely,

Catherine W. Brown,
Assistant Legal Adviser
Consular Affairs

ORAL ARGUMENT SET FOR NOVEMBER 4, 1994

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5104
(C.A. No. 94-0361)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ET AL., *Appellants*,

v.

UNITED STATES DEPARTMENT OF, STATE, BUREAU OF CONSULAR AFFAIRS ET AL., *Appellees*.

NOTICE TO THE COURT

Appellants, through undersigned counsel, hereby give notice to the Court that the Department of State has determined that, effective December 1, 1994, United States Consulates in Hong Kong and other Southeast Asian countries will discontinue immigrant visa processing for Vietnamese asylum seekers who have been determined not to qualify as refugees. The attached cable to affected United States Consulates sets forth instructions for implementing this decision.

Respectfully submitted,

ERIC H. HOLDER, JR.
United States Attorney

JOHN D. BATES
Assistant United States Attorney

R. CRAIG LAWRENCE
Assistant United States
Attorney

BERNADETTE SARGEANT
Assistant United States
Attorney

Outgoing Telegram
Department of State

Unclassified

CA/VO/F/P:GSHEAFFER:GS
10/28/94 31173 WWVOFPL 9297
CA/VO:MHANCOCK

PRM: TRUSCH
PRM/A/O:DPENDERGRASS
EAP/CM:DKELLY
PRM/A/O:NLEES-THOMPSON

CA/VO/F:AMARWITZ
L/CA:CBROWN
EAP/RSP:AJURY

CA, PRM
Immediate Hong Kong, Geneva immediate, Bangkok immediate, Singapore immediate, Kula Lumpur immediate, Manila immediate + Priority Tokyo, Canberra priority, Ottawa priority

Geneva for RMA
E.O. 12356: N/A
TAGS: CVIS, PREF, HK

Subject: Cessation of immigrant visa processing for screened-out Vietnamese

Reference: (A) state 48852, (B)(State 46562, (C) Hong Kong 8878 (Notal)

1. Summary. Department concurs with recommendation in REFTEL (C) that immigrant visa applications from screened-out Vietnamese asylum seekers should

no longer be processed in the countries of first asylum. A careful review determined that the practice has helped to discourage voluntary repatriations. Action requests and proposed talking points follow. End summary.

2. REFTEL (A) Advised posts in countries with Vietnamese first-asylum camps to attempt normal immigrant visa processing for any current beneficiaries among screened-out Vietnamese detainees. REFTEL (A) also asked posts to advise Department whether host governments would permit such processing, and to report the policy's impact on the willingness of persons in first asylum countries to return home.

3. Of addressee posts only Hong Kong was able to conduct normal immigrant visa processing in accordance with these instructions. Hong Kong and other posts later reported adverse impacts resulting from the policy in reftel. Hong Kong recommended that processing of immigrant visa applications from screened-out Vietnamese should end. Department concurs.

4. Effective December 1, Hong Kong should cease accepting new immigrant visa cases for processing from screened-out Vietnamese detainees.

5. Applications from individuals who report themselves documentarily qualified prior to December 1 should be completed as expeditiously as possible given Hong Kong's workload. Vietnamese detainees who are beneficiaries of approved immigrant visa petitions, but who do not report themselves documentarily qualified prior to December 1, should be advised that their cases will be processed by the orderly departure program after repatriation to Vietnam.

6. Hong Kong should immediately notify Vietnamese detainees with pending IV cases, as well as organizations or attorneys of record known to be assisting Vietnamese detainees with U.S. immigration claims, of the December 1 cutoff date. Action addressee should advise host governments that the U.S. will no longer attempt to process outside Vietnam any immigrant visa applications from screened-out Vietnamese detainees.

7. Posts can draw on the following talking points to respond to inquiries:

—After careful consideration of the situation, the Department of State has decided to cease accepting immigrant visa applications from screened-out Vietnamese asylum-seekers in first asylum camps in southeast Asia and Hong Kong.

—Upon review, the Department determined that the practice of processing applications from this group was having an adverse effect on U.S. foreign policy concerns in Asia. There are clear indications that our accepting these immigrant visa cases outside Vietnam is one of the factors discouraging screened-out asylum seekers from agreeing to repatriation, and thus seriously undermines the comprehensive Plan of Action.

—Applicants who are not ready for a visa interview in accordance with U.S. regulation by December 1 will be required to process their cases in Vietnam through the U.S. orderly departure program.

—ODP estimates that visa processing for repatriated Vietnamese now can be completed in three to four months. The Department of State will work closely with ODF to ensure that these cases are handled as expeditiously as possible.

8. For Geneva: Please notify appropriate officials at UNHCR of the above developments.
Jakarta Immediate Y

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civ. Action No. 94-0361 (SSH)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, ("LAVAS") ET AL., *Plaintiffs*,

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS ET AL., *Defendants*.

DECLARATION OF YUNG MANDY

I, Yung Mandy, declare:

1. My name is Yung Mandy (previously known as Ong Man Hue). I reside at 377 W. Broad Street, Falls Church, VA 22046. I am a native of Vietnam, born September 12, 1965, and a citizen of the United States. I am the wife of Luu Han Vy.

2. My husband is a citizen of Vietnam. He arrived in Hong Kong in 1990, where he has been incarcerated in closed detention centers ever since. He currently resides in the Tai A Chau Detention Centre.

3. Both my husband and I are ethnic Chinese. After the fall of Saigon, especially at the climax of the 1979 war between Vietnam and China, my family was harassed and discriminated against by local authorities and the Vietnamese Government. I was denied schooling and my future was shattered. In 1979, My father successfully escaped Vietnam with some of my siblings and resettled in America the following year.

4. Luu Han Vy and I were introduced to each other through a family member and built our relationship while we were in Vietnam.

5. He was also unable to tolerate the severe and persistent discrimination and persecution of ethnic Chinese. My husband decided to flee Vietnam, when the rest of my family and I were sponsored by my father and resettled in the United States in 1989.

6. On September 15, 1992, I came to Hong Kong to marry my husband. On October 5, 1992, I filled out an I-130 petition for an immigrant visa for my husband and sent the completed form to the Immigration and Naturalization Service.

7. On October 30, 1992, I was informed by the INS that my petition for my husband was approved with a priority date of October 13, 1992 and that it had been sent to the Department of State Immigrant Visa Processing Center. (Exhibit A)

8. I became a United States citizen on May 18, 1995. (Exhibit B)

9. I amended my visa petition to reflect that I am now an U.S. citizen. My husband is now eligible for his interview with the American Consulate.

10. Despite the Consulate's insistence, my husband is absolutely unwilling to return to Vietnam. His unwillingness to return to Vietnam is because he fears that his life and freedom would be threatened by the Vietnamese authorities. Moreover, he has no confidence that if he were to repatriate, the communist authorities would permit him to leave the country, even if the U. S. is willing to grant him an immigrant visa.

11. I, Yung Mandy, declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in conformity with 28 U.S.C. Sec. 1746 in Fairfax, Virginia, on May 22, 1995.

Yung Mandy

DECLARATION OF MARK L. ZUCKERMAN

1. I am the Regional Coordinator for Legal Assistance for Vietnamese Asylum Seekers ("LAVAS"), based in Hong Kong. For the past 21 months, I have worked with hundreds of Vietnamese asylum seekers detained in Hong Kong who wish to migrate to the United States to be reunited with their family members there. I am familar with the laws and regulations of the U.S. Government concerning immigration to the United States.

2. The following individual is a screened-out Vietnamese asylum seeker who is currently detained in Hong Kong and is the beneficiary of a current U.S. immigrant visa petition.

3. Mr. Nguyen Van Ton, a native and national of Vietnam, presently resides at Tai A Chau Detention Center. He arrived in Hong Kong in 1990 as an undocumented illegal alien and was immediately placed in detention. Mr. Nguyen is the unmarried son of Mr. Nguyen Van Dien. The senior Mr. Nguyen was born in Vietnam and is now a U.S. citizen. He resides at 2451 Kensington Avenue, Philadelphia, Pennsylvania 19125. Mr. Nguyen has filed a petition for a United States immigrant visa on behalf of his son, Mr. Nguyen Van Ton. The Immigration and Naturalization Service approved the petition on May 15, 1996. The petition is current under the F1 preference category—unmarried child of U.S. citizen.

4. The U.S. Consulate in Hong Kong refuses to process the immigrant visa petition of the above named applicant in Hong Kong and requires that the beneficiary, Mr. Nguyen Van Ton, return to Vietnam for processing under the Orderly Departure Program.

5. Under penalty of perjury of the laws of the United States, I declare that the foregoing is true and correct to the best of my knowledge.

Executed in Washington, D.C.
On June 24, 1996.

_____
Mark L. Zuckerman

Supreme Court of the United States

No. 95-1521

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., *Petitioners*

v.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, INC., ET AL.

ORDER ALLOWING CERTIORARI.

Filed June 17, 1996.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

June 17, 1996

(4)

No. 95-1521

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., PETITIONERS

v.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
MICHAEL JAY SINGER
ROBERT M. LOEB
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

58pp

QUESTIONS PRESENTED

1. Whether a court may review the decision not to process an immigrant visa application in a particular foreign country based on consular venue considerations.

2. Whether the policy of the United States Government, in conformity with an international agreement governing migration in Southeast Asia, not to accept immigrant visa applications from migrants who have been determined under the agreement not to be refugees until they return to their country of origin violates 8 U.S.C. 1152(a)(1), which provides that no person shall be discriminated against in the issuance of an immigrant visa because of that person's nationality.

PARTIES TO THE PROCEEDINGS

Petitioners are the United States Department of State, Bureau of Consular Affairs; Warren Christopher, Secretary of State; Mary A. Ryan, Assistant Secretary of State for Consular Affairs; and Donna Hamilton, Deputy Assistant Secretary of State for Consular Affairs. Petitioners were defendants in the district court and appellees in the court of appeals. All individual petitioners appear in their official capacities only. Richard Mueller, who was a defendant-appellee below in his official capacity as Consul, Consulate General of the United States, Hong Kong, has left that position; his replacement, Richard Boucher, will assume the duties of the office on or about August 18, 1996. Wayne Leininger, who was a defendant-appellee below in his official capacity as Chief of the Consular Section, Consulate General of the United States, Hong Kong, has left that position; his replacement, Robert Tynes, will assume the duties of the position on or about August 20, 1996. Matthew Victor, who was also a defendant-appellee below in his official capacity as Refugee Officer, Consulate General of the United States, Hong Kong, no longer holds that position, which has been abolished; the responsibilities of the position have been distributed among several other officials.

Respondents, who were plaintiffs-appellants below, are Legal Assistance for Vietnamese Asylum Seekers, Inc. (LAVAS), Thua Van Le, Em Van Vo, Thu Hoa Thi Dang, and Truc Hoa Thi Vo. Respondents have also moved in this Court to add Luu Van Hy, Ton Van Nguyen, Mandy Yung, and Dien Van Nguyen as respondents.

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Statutes, rule and regulations—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1521

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., PETITIONERS

v.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The order of the district court denying a temporary restraining order (Pet. App. 19a-21a) is unreported. The order of the court of appeals entering a preliminary injunction (Pet. App. 22a-23a) is unreported. The order of the district court granting summary judgment for the government (Pet. App. 24a-28a) is unreported. The opinion of the court of appeals that reversed the district court's grant of summary judgment to petitioners, declared the government's policy to be in violation of 8 U.S.C. 1152(a)(1), and remanded for further proceedings (Pet. App. 1a-18a) is reported at 45 F.3d 469.

A subsequent order of the court of appeals directing a limited remand on the issue of mootness (Pet. App. 29a-30a) is unreported. The opinion of the district court on remand, concluding that the case was moot (Pet. App. 31a-38a), is reported at 909 F. Supp. 1. The opinion of the court of appeals denying the government's petition for rehearing and reversing the district court's mootness ruling (Pet. App. 39a-49a) is reported at 74 F.3d 1308. The order of the court of appeals rejecting the government's suggestion of rehearing en banc (Pet. App. 50a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1995. Pet. App. 1a. A petition for rehearing was denied on February 2, 1996. Pet. App. 39a. The petition for a writ of certiorari was filed on March 21, 1996, and was granted on June 17, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 701(a) of Title 5, United States Code, provides:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

2. Section 1152(a)(1) of Title 8, United States Code (Section 202(a)(1) of the Immigration and Nationality Act) provides:

> Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

3. Section 1202(a) of Title 8, United States Code (Section 222(a) of the Immigration and Nationality Act) provides in part that "[e]very alien applying for an immigrant visa and for alien registration shall make application therefor in such form and manner and at such place as shall be by regulations prescribed."

STATEMENT

This case concerns the application of Section 202(a)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. 1152(a)(1), which, among other things, prohibits United States consular officials from discriminating on the basis of nationality "in the issuance of an immigrant visa." Respondents contend that that provision is contravened by a Department of State policy regarding the processing of immigrant visa applications of aliens who migrated illegally to Hong Kong, and who have been determined (pursuant to an international agreement to which the United States is a party) not to qualify for refugee status. Under the challenged policy, such immigrant visa applications must be filed in the aliens' home country and may not be processed by United States consular officials in Hong Kong; the policy does not, however, affect the substantive standards to be applied to such applications. The court of appeals nevertheless agreed with respondents that the policy violates Section 1152(a)(1). The court of appeals also rejected the government's threshold contention that consular visa determinations, including those concerning where visa applications are to be filed by aliens outside the United States, are not subject to judicial review.

1. During the 1980s, a combination of political and economic circumstances in Vietnam and the prospect of resettlement in another country, particularly the United

States, induced many Vietnamese nationals to migrate to other countries in Southeast Asia. The resources of the countries where those migrants first landed had already been strained by large migrations from Vietnam, Laos, and Cambodia; more than 750,000 persons from Vietnam alone have migrated to other countries in Southeast Asia. Because of the substantial migration, some countries began to turn back migrant "boat people," which often resulted in tragic loss of life at sea. In 1988, Hong Kong revoked its prior policy of according the boat people presumptive status as refugees and began to treat them as illegal aliens. See J.A. 69, 123.

To defuse the migration crisis, to protect those refugees who genuinely feared political persecution, to avoid further loss of life, and to deter further uncontrolled migration, 50 countries, including the United States, Vietnam, and Hong Kong, entered in 1989 into a multinational initiative, the Comprehensive Plan of Action (CPA).[1] The CPA established an internationally coordinated system, under the auspices of the United Nations High Commissioner for Refugees (UNHCR), to process claims of refugee status by Vietnamese and Laotian migrants. Under the CPA, Vietnamese and Laotian migrants were permitted to land in other countries (including Hong Kong) and were "screened" by those "first asylum" countries under international standards to determine

[1] The text of the CPA is reprinted at J.A. 31-41. Although the United States as a matter of foreign policy adhered to the terms of the CPA, it did not have formal status under United States law. The CPA (including its refugee screening procedures) formally ended on June 30, 1996, but because many screened-out Vietnamese migrants have remained in Hong Kong after that date, the policy concerns that led to its adoption remain live. See CPA Steering Committee Consensus Statement at 2 (Mar. 6, 1996) (lodged with the Clerk). The formal conclusion of the CPA does not affect the issues in this case.

whether they were refugees (*i.e.*, whether they had a well-founded fear of persecution).[2]

Those migrants who were found entitled to refugee status ("screened-in") were permitted to stay temporarily in the country of first asylum and, from there, to seek resettlement in a third country. J.A. 38-39, 124. On the other hand, a central tenet of the CPA was that each migrant found not to be eligible for refugee status should return to his or her country of origin. The agreement of the CPA's participants that "screened-out" migrants would be repatriated was essential in persuading reluctant countries to permit migrants to land and to establish their claims to refugee status, rather than turn them back to sea. See J.A. 124-127. The CPA provided that "every effort will be made to encourage the voluntary return" of screened-out migrants (J.A. 39), but it did not prohibit countries of first asylum such as Hong Kong from involuntarily repatriating them.[3]

[2] Pursuant to the CPA, the migrants were screened under criteria established by the UNHCR, based on the 1951 United Nations Convention Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6259, 6261-6264. In Hong Kong, the migrant asylum seekers were screened by Hong Kong authorities under UNHCR standards to determine whether they had a well-founded fear of persecution. If a migrant was found not to qualify as a refugee, he or she was permitted to appeal to the Refugee Status Review Board, an independent body established under the CPA. If the Board found that the migrant did not qualify as a refugee, the migrant could appeal further to the UNHCR. J.A. 105.

[3] As a matter of policy, the United States Government initially opposed forced repatriation to Vietnam, even of migrants who had been determined not to be refugees. The United States continues to have a strong preference for voluntary repatriation, but, at the February 1994 meeting of the Steering Committee of governments administering the CPA, the United States stated that it no longer objects in principle to the mandatory repatriation of those screened-out

Accordingly, under the CPA, a Vietnamese national screened out from refugee status in Hong Kong must return to Vietnam. Such a Vietnamese national may apply in Vietnam for immigration to the United States under the Orderly Departure Program (ODP), if he or she is the beneficiary of a visa petition filed by a United States sponsor (see p. 7, *infra*). The ODP is a major emigration program established in 1979 by the United States and Vietnamese governments, by which more than 360,000 Vietnamese nationals had been resettled in the United States directly from Vietnam as of March 15, 1994. J.A. 129-131. Migrants who voluntarily return from Hong Kong are usually placed at the head of the processing queue in Vietnam; the evidence below was that processing and approval of a visa application through the ODP after a migrant's return takes approximately three to six months; with other exit formalities, the total time from a migrant's return to Vietnam until his or her exit under the ODP is about six to twelve months. J.A. 131, 177. United States officials have concluded that Vietnamese officials do not persecute screened-out migrants who have returned from Hong Kong and do not impede their departure under the ODP. J.A. 131, 201, 204. The UNHCR also has found "no substantiated reports that any of the 60,000 returnees have suffered ill treatment on return." See J.A. 190 (CPA Steering Committee statement (Feb. 14, 1994)).

2. A number of Vietnamese nationals who migrated illegally to Hong Kong and failed to qualify for refugee status under the CPA screening process have sought to

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migrants who refuse to leave Hong Kong voluntarily. J.A. 127, 176, 196. That change in policy was based on improvements in conditions in Vietnam and in the Orderly Departure Program (ODP) facilitating controlled emigration directly to the United States from Vietnam. J.A. 177, 197.

apply in Hong Kong for immigrant visas permitting them to travel to the United States. Some of those migrants are eligible for immigration to the United States as the close relatives of United States citizens or aliens lawfully admitted for permanent residence in the United States; the individual Vietnamese respondents in this case are relatives of United States citizens. See 8 U.S.C. 1151(b) and 1153(a); J.A. 17, 223, 225.

Under the procedures for immigrant visas established under the INA, a United States citizen or permanent resident alien seeking to sponsor the immigration of a close relative may file a petition with the Attorney General, seeking to have his or her relative classified as an alien eligible for an immigration preference. See 8 U.S.C. 1154(a).[4] If the Attorney General (through the Immigration and Naturalization Service (INS)) determines that the sponsored alien is in fact entitled to the preference, she approves the petition and forwards it to the State Department. 8 U.S.C. 1154(b). A consular officer of the State Department then determines whether the alien is excludable from admission to the United States under the INA and is therefore ineligible to receive an immigrant visa. *Ibid.*; see 8 U.S.C. 1182(a).[5] As a general matter, no intending immigrant may be admitted to the United States without a valid immigrant visa issued by a consular officer. 8 U.S.C. 1181(a), 1182(a)(7).

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[4] An employer wishing to employ an alien within the United States may also file a petition with the Attorney General to have an alien accorded an employment-based immigration preference. See 8 U.S.C. 1154(a)(1)(D).

[5] The Attorney General may, in her discretion, waive certain of the bases for exclusion of an alien seeking to immigrate to the United States. 8 U.S.C. 1182(h). That determination is made by the Attorney General, acting through the INS, not State Department consular officials.

Prior to April 1993, the United States Consulate General in Hong Kong processed the immigrant visa applications of migrants before they were screened under the CPA, and sometimes even after they were screened out. J.A. 106-107. The processing of visa applications filed by screened-out migrants provoked objections from the UNHCR and other signatories to the CPA. They maintained that processing such applications for direct resettlement in the United States from countries of first asylum such as Hong Kong would undermine the CPA process, by deterring voluntary repatriation of screened-out migrants and inducing further migration. See J.A. 129. Taking into account those objections and the impact of such processing on voluntary repatriation, the State Department adopted a policy against processing any new immigrant visa applications of screened-out migrants until they return home.[6] The United States now concurs with other countries that the policy against accepting immigrant visa applications in Hong Kong is "fundamentally important to the success of the CPA," for unless it is made clear to screened-out Vietnamese migrants that they will not be resettled in the United States directly from Hong Kong and other first-asylum countries, those migrants will be unwilling to return voluntarily to Vietnam. See J.A. 128.[7]

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[6] The State Department initially adopted a policy against processing screened-out migrants' applications in April 1993. J.A. 109. On February 24, 1994, the Department suspended that policy temporarily. J.A. 206, 210. A firm policy against processing applications by screened-out migrants was resumed on December 1, 1994, prospectively only. J.A. 218-222.

[7] At the February 1995 meeting of the Steering Committee of governments administering the CPA (after the district court proceedings on the merits in this case were completed), the United States joined the UNHCR and other CPA participants in reaffirming their commitment to voluntary repatriation of screened-out migrants. The consensus statement adopted by the Steering Committee at that meeting included a commitment, accepted by the United States, not to consider screened-out Vietnamese migrants for resettlement until they return to Vietnam. See Charles Sykes Aff. ¶ 8 (June 15, 1995); Sykes Aff. ¶ 5 (Feb. 16, 1996) (both lodged with the Clerk of this Court at the petition stage). In February 1996, the British Foreign Secretary appealed to Secretary of State Warren Christopher for a "clear statement" by the CPA Steering Committee "that the remaining migrants should now go back to Vietnam." Sykes Aff. ¶¶ 8-9 (Feb. 16, 1996). On March 6, 1996, the United States joined another consensus statement of the CPA Steering Committee, again reaffirming that Vietnamese migrants found not to be refugees should return to Vietnam. See CPA Steering Committee Consensus Statement (Mar. 6, 1996) (lodged with the Clerk).

3. This action was brought in the United States District Court for the District of Columbia on February 25, 1994, to challenge the United States Government's policy against processing visa applications of screened-out migrants until they return home. The plaintiffs (respondents in this Court) are a non-profit legal-rights organization, Legal Assistance for Vietnamese Asylum Seekers, Inc. (LAVAS), two Vietnamese nationals who migrated illegally from Vietnam to Hong Kong (Ms. Thu Hoa Thi Dang and Ms. Truc Hoa Thi Vo), and the individual migrants' sponsors in the United States. Pursuant to the CPA, Ms. Dang and Ms. Vo had been screened by Hong Kong authorities under international standards, and had been found not to be refugees. They had then sought to apply for immigrant visas to travel to the United States. Each was informed by a consular officer at the United States Consulate General in Hong Kong that, because she had been found not to be a refugee, she could not apply for

an immigrant visa in Hong Kong but could apply only in her country of origin.[8]

The district court granted the government's motion for summary judgment. Pet. App. 24a-28a. The district court rejected respondents' primary contention that the government's policy concerning screened-out migrants violated a State Department regulation, which at the time provided that, "[u]nder ordinary circumstances, an alien seeking an immigrant visa shall have the case processed in the consular district in which the alien resides." 22 C.F.R.

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[8] Under an interim policy in effect from February to December 1994 (see p. 8, n. 6, *supra*), Ms. Dang and Ms. Vo were later permitted to apply for visas in Hong Kong. Both did apply; Ms. Dang subsequently received an immigrant visa and traveled to the United States. The case is therefore moot as to her and her sponsor. Pet. App. 42a. The United States Consulate General in Hong Kong denied Ms. Vo's visa application because (among other things) there was insufficient information to support a conclusion that she would not be a public charge in the United States. In such circumstances, the applicant may submit additional information in support of her application. 22 C.F.R. 40.101(b). Ms. Vo was permitted to submit such further information until November 16, 1996, and she has done so; her application is now pending before the Consulate General in Hong Kong.

Because of the possibility that a final decision on Ms. Vo's application could make this case moot as to her and her sponsor, respondents moved on June 25, 1996, to join additional parties as respondents in this Court and for class certification, to ensure the continuation of a live controversy. In our response filed on July 12, 1996, we informed the Court that we did not oppose the joinder as respondents of Mr. Luu Han Vy and Mr. Ton Van Nguyen, who are screened-out Vietnamese migrants currently in Hong Kong and the beneficiaries of current immigrant visa petitions, and Ms. Mandy Yung and Mr. Dien Van Nguyen, their respective United States sponsors. See J.A. 223-226. We did, however, oppose respondents' motion for class certification. As of the filing of this brief, the Court had not acted on respondents' motion.

42.61(a) (1993). The court accepted, as a policy choice entitled to deference, the State Department's determination that "the situation of the detained Vietnamese asylum-seekers in Hong Kong is not an 'ordinary circumstance.'" Pet. App. 27a (footnote omitted). Accordingly, it concluded that "the failure to process the immigrant visa applications of Vietnamese asylum-seekers denied refugee status in Hong Kong does not violate the INA and the regulations promulgated thereunder." *Id.* at 28a.

4. A divided panel of the District of Columbia Circuit reversed and remanded. Pet. App. 1a-18a. As an initial matter, the majority held that the migrant plaintiffs' sponsoring relatives in the United States had a right under the Administrative Procedure Act (APA), 5 U.S.C. 702, to bring an action to require that the migrants' visa applications be accepted in Hong Kong. The majority therefore declined to consider whether the migrant plaintiffs themselves or LAVAS had a right of judicial review. Pet. App. 5a-6a.

On the merits, although the majority rejected respondents' claims based upon the State Department regulation (Pet. App. 7a-8a),[9] it held (*id.* at 8a-12a) that the policy of not processing applications submitted by screened-out Vietnamese migrants in Hong Kong violates 8 U.S.C.

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[9] The regulation was amended effective September 6, 1994. 59 Fed. Reg. 39,955. It now provides that, "[u]nless otherwise directed by the [State] Department," an alien applying for an immigrant visa shall present the application at the consular office having jurisdiction over the alien's place of residence, or (if the alien has no residence) at the consular office where the alien is physically present. 22 C.F.R. 42.61(a). The court of appeals noted that the State Department has exercised its authority to "direct otherwise" with respect to the venue for processing visa applications by screened-out Vietnamese migrants in Hong Kong. Pet. App. 8a.

1152(a)(1). The court held that petitioners had violated that provision in drawing what it believed to be "an explicit distinction between Vietnamese nationals and nationals of other countries when refusing to process the visas of the screened out Vietnamese immigrants." Pet. App. 9a. The court declined to defer under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), to the State Department's contrary interpretation of Section 1152(a)(1), as it found that Section to be unambiguous on the point. Pet. App. 11a.[10]

Judge Randolph dissented. Pet. App. 13a-18a. He first noted that "[t]he potential repercussions of the majority's decision are, to say the least, disquieting. The flight of illegal aliens to Hong Kong and elsewhere has created an international crisis. Fifty nations have sought to avert the flood by stopping the flow. Not processing their visas in Hong Kong removes one of the reasons so many of these people are leaving their homeland and embarking on the dangerous journey across the South China Sea." *Id.* at 14a. Judge Randolph then concluded that "[t]he so-called 'discrimination' the majority detects stems from the illegal status of the screened out boat people, rather than from the fact (if it is a fact) that they are all Vietnamese nationals." *Id.* at 15a. He reasoned that the government's policy with respect to screened-out migrants in Hong Kong "is not discrimination on the basis of nationality, but discrimination on the basis of legality. And the statute does not forbid it." *Ibid.*

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[10] The majority erroneously stated that an INS interpretation of the INA is at issue here. Pet. App. 11a. In fact, the particular visa provisions at issue are administered by the Department of State and its consular officers, and it therefore is the Department's interpretation that is entitled to deference under *Chevron*, absent a controlling interpretation by the Attorney General. See 8 U.S.C. 1103.

The government then filed a petition for rehearing and suggestion of rehearing en banc. After a limited remand for proceedings on the issue of mootness, the panel concluded that the case was not moot and denied rehearing. Pet. App. 39a-46a. Judge Randolph agreed with the disposition on mootness but dissented from the denial of rehearing. He noted that "further doubts have been raised about the majority's interpretation" of Section 1152(a)(1). Pet. App. 49a. He pointed out that, in a companion case,[11] the government argued that Section 1152(a)(1) governs

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[11] While the government's rehearing petition in this case was pending in the court of appeals, a separate action (now known as *Lisa Le* v. *United States Department of State, Bureau of Consular Affairs*) was filed in the United States District Court for the District of Columbia by another screened-out Vietnamese migrant in Hong Kong and her sponsor in the United States. No. 95-989 (summary judgment granted Mar. 2, 1996), appeal pending, Nos. 95-5425, 96-5058 (D.C. Cir.). Those plaintiffs' claims became moot after the United States Consulate in Hong Kong processed the migrant's visa application (pursuant to a preliminary injunction issued by the district court, which the court of appeals refused to stay) and granted her an immigrant visa. Twenty-five more screened-out migrants and their 25 sponsors entered the *Lisa Le* case as additional plaintiffs. On March 1, 1996, the district court granted summary judgment for all but two of those additional plaintiffs (who were denied intervention), reasoning that the case was, "in all relevant respects, identical" to this one. Pet. App. 70a. The district court permanently enjoined the government from "implementing [its] decision to decline processing plaintiff detainees' immigrant visa applications at the United States Consulate in Hong Kong." *Id.* at 73a. The government appealed the district court's injunctions in *Lisa Le* to the D.C. Circuit and suggested that the case be heard initially by the court of appeals en banc, so that the full court could reconsider the panel's decision in the present case. The full court granted initial hearing en banc in *Lisa Le* (*id.* at 74a-75a) and also stayed the district court's injunctions. After this Court granted plenary review in this case, the D.C. Circuit, on June 26, 1996, granted the appellees' motion to suspend the en banc proceedings in *Lisa Le* pending the outcome of this case.

only the issuance of visas, not "where visa applications must be processed," and that consular venue determinations are, in any event, "entrusted entirely to the Secretary of State." *Ibid.* Those arguments were also presented in the government's petition for rehearing and suggestion of rehearing en banc (at 5-6, 10-13) in this case. The full court of appeals nonetheless rejected the government's suggestion of rehearing en banc, with four judges dissenting. Pet. App. 50a-51a.

INTRODUCTION AND SUMMARY OF ARGUMENT

For important reasons of foreign policy, the Department of State has determined that immigrant visa applications from migrants determined under the Comprehensive Plan of Action not to be refugees should be accepted only in those migrants' country of origin, and not in the countries to which they have illegally migrated. The Department made that policy decision after concerns were raised by the international community that processing applications for immigrant visas to the United States from screened-out Southeast Asian migrants was disrupting the process of voluntary repatriation of those migrants, by giving them a strong incentive to remain in countries of first asylum. The Department's "consular venue" policy does not affect any of the substantive standards for processing migrants' immigrant visa applications. No migrant who returns to his or her home country and applies there will be subject to stricter substantive standards as a result.

The court of appeals concluded that the State Department's policy violates 8 U.S.C. 1152(a)(1), which (among other things) prohibits discrimination on the basis of nationality in the issuance of an immigrant visa. That decision is wrong on several accounts, and is profoundly damaging to the State Department's ability to respond to

the international disruption caused by massive uncontrolled migration. The international community's experience with migration in Southeast Asia has demonstrated that uncontrolled migration presents difficult issues requiring a coordinated international response. Humanitarian concerns must be balanced with neighboring countries' need and right to control their borders; refugees with legitimate claims to asylum must be distinguished from economic migrants having lesser claims on the international community to resettlement. As part of its response to the crisis of massive migration in Southeast Asia, the State Department concluded, along with the rest of the international community, that screened-out migrants who do not have a legitimate claim to refugee status should return to their home countries, and that continued processing of those migrants' immigrant visa applications in first-asylum countries would deter them from returning. The court of appeals had no basis for setting aside that determination.

I. A. Congress has precluded judicial review of the Department of State's consular venue policy challenged in this case. See 5 U.S.C. 701(a)(1). Although there is a presumption of judicial review of agency action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, that presumption does not apply, or at the very least is rebutted, in situations like this one, touching directly on foreign policy. This case involves the power to exclude aliens from the Nation, a power that is integrally related to the conduct of foreign relations. The Court has always viewed the exclusion power as reserved entirely to the political Branches of the national government, without judicial intervention, except under such circumstances as Congress expressly authorizes or the Constitution requires. The doctrine of consular nonreviewability, holding that courts have no authority to review visa determina-

tions concerning aliens abroad, reflects that policy of judicial non-interference in exclusion decisions.

Congress has not expressly provided any right to judicial review of exclusion policies or related decisions at the behest of aliens residing abroad or their United States sponsors. To the contrary, Congress made clear in 1961 that exclusion decisions may not be challenged under the APA, and may be challenged only by aliens who have arrived at a port of entry to the United States and are in the custody of United States authorities, by means of the writ of habeas corpus. When Congress acted in 1961, this Court had already rejected the suggestion that exclusion decisions could be challenged by aliens residing abroad. It is unimaginable that Congress intended to allow aliens residing abroad to challenge decisions or policies concerning their admission to the United States from overseas, and thereby to avoid the custody requirement of the habeas corpus remedy. It is even more difficult to believe that Congress intended for exclusion policies to be challenged by those aliens' United States sponsors, who are less directly affected than the aliens abroad by matters such as the consular venue rule challenged here.

B. Judicial review is unavailable in this case for the additional reason that consular venue decisions are committed to the discretion of the Department of State by law. See 5 U.S.C. 701(a)(2). Under 8 U.S.C. 1202(a), the Secretary of State has broad discretion to determine where aliens shall apply for visas. Section 1202(a) provides no substantive standards for review of that discretion, and the Department's consular venue rules must balance a large number of factors, including the state of relations with foreign countries, security concerns, and resources. There is no "law to apply" in judicial review of those determinations. Indeed, although respondents contend that the venue rule here discriminates on the basis of nationality,

consular venue rules must always take account of an alien's nationality, since the Department must determine in what countries, and where in such countries, visa applications will be accepted. There is no meaningful way to determine whether citizens of those foreign countries are similarly situated, such that one might conclude that consular venue rules "discriminate" on the basis of nationality.

II. A. If the Court nevertheless reaches the merits, the judgment of the court of appeals should be reversed on the ground that the challenged policy does not violate the anti-discrimination rule of Section 1152(a)(1). Section 1152(a)(1) does not apply to consular venue policies. That Section prohibits discrimination on the basis of nationality in the "issuance" of a visa, but does not speak to the place where an alien must apply for a visa. That matter is governed separately by Section 1202(a), which gives the Secretary broad discretion to establish consular venue rules. In its mistaken conclusion that Section 1152(a)(1) applies to consular venue, the court of appeals overlooked the placement of that provision among sections otherwise establishing substantive visa preferences and numerical limits on the number of visas to be issued (in total and to nationals of any particular country). Section 1152(a)(1) only prohibits discrimination on the basis of nationality in granting or denying visas, other than in accordance with those numerical limits.

B. The consular venue policy at issue here does not "discriminate" in visa issuance on the basis of nationality. The policy does not distinguish among aliens on the basis of their nationality, but rather on the basis of their status as "screened-out" under the CPA (or not). Screened-out Vietnamese and Laotian migrants may not apply for immigrant visas in Hong Kong, but "screened-in" Vietnamese and Laotian migrants, and also all other

Vietnamese nationals residing legally or illegally in Hong Kong, may do so. Even if we assume that the policy does distinguish on the basis of nationality in that it is relevant only to Vietnamese (or Southeast Asian) migrants, it nonetheless does not "discriminate," because there are no nationals of any other countries who are similarly situated. The venue policy here was a reasonable response to a crisis affecting nationals of only certain countries, and it is at present relevant only with regard to those nationals. Moreover, because the policy has no effect on substantive admission standards, it does not affect the number of visas that may ultimately be "issued," and Vietnamese nationals have in fact been among the greatest recipients of immigrant visas in recent years. Respondents therefore cannot sustain their claims of "discrimination" in any event.

ARGUMENT

I. THE DEPARTMENT OF STATE'S CONSULAR VENUE POLICIES ARE NOT SUBJECT TO JUDICIAL REVIEW

The court of appeals ruled that United States citizen sponsors of aliens who reside abroad and are seeking admission to the United States may challenge, under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, the Department of State's decision that immigrant visa applications should be reviewed only in a particular place. Pet. App. 5a-6a. That decision is incorrect. Consular venue determinations are not subject to judicial review under the APA, at the behest of either aliens residing abroad or their sponsors in the United States, for two reasons. The INA implicitly precludes such judicial review, and consular venue decisions are committed to agency discretion by law. See 5 U.S.C. 701(a)(1) and (2).

A. Judicial Review of Consular Venue Determinations Is Precluded By The Immigration And Nationality Act

"The APA confers a general cause of action upon persons 'adversely affected or aggrieved by agency action within the meaning of a relevant statute,' but withdraws that cause of action to the extent the relevant statute 'preclude[s] judicial review.'" *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 345 (1984) (citations omitted). "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Ibid.*; see *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301 (1943).

Although there is a "presumption" favoring judicial review, that presumption, "like all presumptions, * * * may be overcome" in a variety of ways under a particular statute, including specific statutory language, the legal background against which the statute was enacted, and "inferences of intent drawn from the statutory scheme as a whole." *Community Nutrition Institute*, 467 U.S. at 349; see *Heikkila* v. *Barber*, 345 U.S. 229 (1953). And the presumption itself "runs aground" in certain areas, such as national security and foreign affairs, which have traditionally been thought not to be fit subjects for judicial intervention. See *Department of Navy* v. *Egan*, 484 U.S. 518, 527 (1988). This case involves an area in which similar concerns are present, for the Department of State's consular venue policies involve diplomatic and political considerations inappropriate for second-guessing by the courts. Indeed, the exercise of the visa function by consu-

lar officials has traditionally been a field of non-intervention by the courts.

1. a. Analysis of the availability of judicial review must begin with the recognition that this case fundamentally involves the power of *exclusion*—that is, the power of the Executive and Legislative Branches to determine which aliens may or may not be permitted to enter the United States, and under what circumstances such entry may be allowed. It has long been settled that the power of exclusion is, by its nature, a political and diplomatic matter under the plenary control of the political Branches, not subject to judicial review except under such conditions as Congress may expressly authorize. As the Court stressed in considering Congress's authority under the Immigration Act of 1891 to prohibit the landing of certain classes of aliens:

> In the United States this power is vested in the national government, which the Constitution has committed to the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and the Senate or through statutes enacted by Congress[.]

Nishimura Ekiu v. *United States*, 142 U.S. 651, 659 (1892). The courts accordingly have no power to intervene in the exercise of that power, except as Congress may expressly authorize or the Constitution may require:

> The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by

> statute, or is required by the paramount law of the Constitution, to intervene.

Fong Yue Ting v. *United States*, 149 U.S. 698, 713 (1893). See also *Lem Moon Sing* v. *United States*, 158 U.S. 538, 546-547 (1895); *Fok Yung Yo* v. *United States*, 185 U.S. 296, 302 (1902).

Excludable aliens actually detained by immigration officials at ports of entry traditionally have had access to the writ of habeas corpus to contest the legality of their detention. See *Nishimura Ekiu*, 142 U.S. at 660. That very limited provision for judicial involvement is triggered by the fact of custody, however, not by an inherent suitability of exclusion matters for judicial review. It therefore does not afford aliens a broad, presumptive right to contest the legality of administrative actions involving their exclusion from or admission into the United States. Quite the contrary; "Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for many years the recognized and declared policy of the country." *Fok Yung Yo*, 185 U.S. at 305.

These principles have been reaffirmed by the Court in decision after decision. In *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (1950), the Court again stated that the power to exclude aliens "is inherent in the executive power to control the foreign affairs of the nation," and that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." See also *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210, 213 (1953); *Heikkila* v. *Barber*, 345 U.S. 229, 233-234 (1953).[12] And more recently, in *Fiallo* v. *Bell*, 430 U.S. 787

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[12] "It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in

(1977), where the Court upheld against constitutional challenge a provision of the INA granting an immigration preference to the mother, but not the father, of an illegitimate child United States citizen, the Court reiterated that "[t]he conditions of entry for every alien * * * have been recognized as matters * * * wholly outside the power of [the courts] to control." *Id.* at 796 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 596-597 (1952) (Frankfurter, J., concurring)).

b. The system for issuance of visas to aliens residing abroad by United States consular officials is integral to the exercise of the sovereign power of exclusion.[13] Although the issuance of a visa does not provide an alien with the right of admission or entry into the United States,[14] it

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regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952).

[13] In fact, the development of the visa system came about in large part in this century as a result of increasingly strict substantive controls on immigration. See 2 Charles Cheney Hyde, *International Law* 1367 (2d rev. ed. 1945). During World War I, the State Department required visas of all aliens seeking entry into the United States. The Immigration Act of May 26, 1924 (ch. 190, 43 Stat. 153), which established the system of numerical quotas that governed immigration to the United States for the following forty years, required United States consular officials to determine the admissibility of aliens into the United States. Visas issued by consular officials became a necessary (though not sufficient) condition for admission into the United States. See § 2(f) and (g); 3 Green Haywood Hackworth, *Digest of International Law* 741-742 (1942) (treatise by State Department Legal Adviser).

[14] See 8 U.S.C. 1201(h). A visa authorizes an alien to travel to a port of entry of the United States and to seek admission there. *Ibid.* In essence, it gives notice to officials of other countries and U.S. immigration officials that the alien has the United States Government's permission to travel to a port of entry of the United States in order to seek admission there.

does constitute a decision by a consular official that the alien appears to satisfy the conditions for entry established by Congress and the Executive Branch. The visa function thus deters excludable aliens residing abroad from attempting to secure passage and entry to the United States, and it also relieves immigration officials in the United States of much of the burden of detaining excludable aliens at ports of entry. The requirement of a visa is therefore no less an exercise of the "political" power of exclusion than is the establishment of classifications of aliens eligible and ineligible for admission.

The same is true of the establishment of the conditions under which a visa may be obtained. Indeed, commentators have noted, with respect to the requirement of a "passport visa" for foreign travel, important variations in countries' practices with regard to the place at which a visa might be obtained:

> Some foreign countries, before recognizing the validity of a passport, require that a visa, or *vise*, shall be, or shall have been affixed to it. * * * Sometimes it is required that the visa be affixed in the country where the passport is issued, by a diplomatic or consular officer of the government requiring it; sometimes simply by such officer anywhere; sometimes at the frontier of the country to which admission is sought.[15]

Longstanding State Department practice reflects the reality that the *place* at which a visa may be obtained is an

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[15] 2 Charles Cheney Hyde, *supra*, at 1198 (quoting Gaillard Hunt, *The American Passport*); 3 John Bassett Moore, *A Digest of International Law* 994 (1906) (treatise by former Assistant Secretary of State).

important part of the diplomatic and political aspect of the power to control immigration. For example, the Department has ordinarily required an alien to apply for an immigrant visa from the consular district in which his or her residence is located, because consular officials in that country will have the necessary expertise to evaluate the alien's visa application, and because adverse information about the alien may not be available elsewhere. See Pet. 17; 59 Fed. Reg. 39,953 (1994). Before 1946, however, the Department permitted nonquota immigrants (who benefited from more lenient immigration rules) to apply outside their home districts under certain circumstances. See *id.* at 39,952-39,953. In the Immigration and Nationality Act of 1952, Congress declined to adopt a restrictive statutory rule requiring all immigrant visa applicants other than displaced persons to apply in their home districts, and expressly authorized the Secretary of State to establish a "more flexible requirement regarding the place of filing of visa applications in both nonimmigrant and immigrant cases." *Id.* at 39,953 (quoting H.R. Rep. No. 1365, 82d Cong., 2d Sess. 54 (1952)). And the State Department has today numerous consular venue rules turning on nationality that reflect security, diplomatic, and management concerns.[16]

In recognition of the political nature of the visa function, and the fact that Congress has never expressly authorized judicial review of consular matters, the courts have long adhered to the doctrine of consular nonreview-

[16] For example, because the Department does not process immigrant visas in their countries, it has directed Afghanis to apply for immigrant visas in Islamabad; Iranians in Abu Dhabi, Ankara, Vienna or Naples; Iraqis in Amman or Casablanca; Lebanese in Abu Dhabi, Damascus, or Nicosia; Libyans in Tunis or Valletta; and Somalis in Nairobi, Dares-Salaam, and Djibouti. See Pet. 17-18.

ability. That doctrine provides that visa decisions by United States consular officers are not reviewable by the judiciary (except perhaps to the extent that a United States citizen claims that the denial of a visa has violated his or her own constitutional rights).[17] The preclusion of judicial review for that category of decisions is a consequence of the "power of Congress to exclude aliens altogether from the United States * * * without judicial intervention." *Ventura-Escamilla* v. *INS*, 647 F.2d 28, 30 (9th Cir. 1981). It is also based on the historically political nature of a visa decision, such that disputes regarding visa applications are matters for "diplomatic resolution" between nations, not judicial redress. *United States ex rel. London* v. *Phelps*, 22 F.2d 288, 290 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928).

2. a. This Court acknowledged the established rule that aliens residing abroad have no basis for judicial review of exclusion decisions in *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956). In that case, the Court held that an alien physically present in the United States who had been determined by immigration authorities to be excludable could contest the validity of the exclusion order

[17] See *City of New York* v. *Baker*, 878 F.2d 507, 512 (D.C. Cir. 1989); *Centeno* v. *Shultz*, 827 F.2d 1212, 1213 (5th Cir. 1987) (per curiam); *Li Hing of Hong Kong, Inc.* v. *Levin*, 800 F.2d 970 (9th Cir. 1986); *Wan Shih Hsieh* v. *Kiley*, 569 F.2d 1179, 1181 (2d Cir.), cert. denied, 439 U.S. 828 (1978); *Gonzalez-Cuevas* v. *INS*, 515 F.2d 1222 (5th Cir. 1975) (per curiam); *Loza-Bedoya* v. *INS*, 410 F.2d 343, 347 (9th Cir. 1969); *Cobb* v. *Murrell*, 386 F.2d 947, 950 (5th Cir. 1967); *Braude* v. *Wirtz*, 350 F.2d 702, 706 (9th Cir. 1965); *Montgomery* v. *FFrench*, 299 F.2d 730, 735 (8th Cir. 1962); *United States ex rel. Ulrich* v. *Kellogg*, 30 F.2d 984, 986 (D.C. Cir. 1929). Cf. *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972) (constitutional challenge to visa denial); *Abourezk* v. *Reagan*, 785 F.2d 1043, 1049-1052 (D.C. Cir. 1986) (statutory and constitutional challenge to visa denial), aff'd by an equally divided Court, 484 U.S. 1 (1987).

by seeking a declaratory judgment under the APA.[18] The Court concluded that the then-recently enacted Immigration and Nationality Act of 1952, unlike the predecessor 1917 immigration statute, had not precluded such review and had not remitted aliens in exclusion proceedings to the limited remedy of habeas corpus. See *id.* at 184-186. In reaching that conclusion, the Court pointed to the legislative history of the 1952 statute, in which the managers of bill in the House of Representatives had stated that "the safeguard of judicial procedure [under the APA] is afforded the alien in both exclusion and deportation proceedings." *Id.* at 186 (quoting H.R. Rep. No. 2096, 82d Cong., 2d Sess. 127 (1952)).

At the same time, the Court limited the geographic reach of its ruling by cautioning that "[w]e do not suggest, of course, that an alien who has never presented himself at the border of this country may avail himself of the declaratory judgment action by bringing the action from abroad." *Tom We Shung*, 352 U.S. at 184 n.3. The Court quoted from the explanation in the Senate Report of the deletion from the bill of a provision that would have expressly limited judicial review of exclusion determinations to habeas corpus proceedings, which stressed that the deletion "was not intended to grant any review of determinations made by consular officers, nor to expand judicial review in immigration cases beyond that under existing law." *Id.* at 185 n.6 (quoting S. Rep. No. 1137, 82d Cong., 2d Sess. 28 (1952)).

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[18] The Court had previously held, in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955), that the Immigration and Nationality Act of 1952 did not preclude challenges under the APA to *deportation* orders, which before passage of the 1952 Act could have been challenged only by habeas corpus proceedings. See *Heikkila* v. *Barber*, 345 U.S. 229 (1953).

In 1961, Congress reacted to the *Tom We Shung* decision by precluding APA suits to challenge both exclusion and deportation orders. Noting that, "[f]or three-quarters of a century, prior to the decision in the *Shung* case, habeas corpus was the sole and exclusive method for testing in court an administrative determination that an alien was not entitled to enter the United States," H.R. Rep. No. 1086, 87th Cong., 1st Sess. 31 (1961), Congress returned judicial review of exclusion decisions to that *status quo ante*. Under 8 U.S.C. 1105a(b), "[n]otwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made * * * may obtain judicial review of such order by habeas corpus proceedings and not otherwise." See Pub. L. No. 87-301, § 5(a), 75 Stat. 651.[19] Cf. *Ardestani* v. *INS*, 502 U.S. 129, 133-134 (1991) (INA supersedes APA with respect to administrative procedures).

Congress did not, in 1961, use express terms to declare that aliens residing abroad were foreclosed from seeking judicial review of exclusion decisions and policies under the APA. That is, however, the necessary and unmistakable effect of its action. As a practical matter, because aliens challenging exclusion decisions are limited to habeas corpus relief, and because they must be in the custody of United States officials to seek such relief, aliens abroad cannot challenge exclusion decisions in United States courts. The habeas corpus remedy, as the legislative history of the 1961 amendments pointed out, requires an alien to bring the action "in the location where the alien is, where he has been excluded, and where

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[19] Congress also simultaneously removed judicial review of deportation orders to the courts of appeals in order to expedite the process of review. See H.R. Rep. No. 1086, *supra*, at 28-29; 8 U.S.C. 1105a(a).

he is 'knocking at the door,'" not (as here) by "burden[ing] an already overwhelmed court system in the District of Columbia by there instituting a declaratory judgment [action]." H.R. Rep. No. 1086, *supra*, at 33.

In light of the settled understanding of the law in 1961—including this Court's recognition in *Tom We Shung* that the 1952 Act had not been intended to allow any right of review to aliens residing abroad—it would be inconsistent with the structure Congress erected to allow aliens abroad to bypass the habeas corpus remedy entirely and seek review under the APA. Permitting an APA suit, the House Report stated, would "give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States against the U.S. Government as a defendant." *Ibid.*

b. Given the subject matter at issue, the usual presumption in favor of judicial review does not operate in this context. Cf. *Department of Navy* v. *Egan*, 484 U.S. 518, 527 (1988) (presumption of review not appropriate in national security context). The legal background against which Congress enacted the APA and the Immigration Acts of 1952 and 1961 established a contrary presumption that immigration statutes afford no right of review of exclusion policies, and that any such right beyond the writ of habeas corpus must be *expressly* authorized by Congress. No such right has been provided to aliens residing abroad.

Even if the presumption of judicial review did operate here, it has surely been rebutted. The "nature of the administrative action" and the "type of problem involved" (*Community Nutrition Institute*, 467 U.S. at 345; *Switchmen's Union*, 320 U.S. at 301) weigh heavily against recognizing a right of judicial review in this situation. As we have explained, the Court has long recognized exclusion as an inherently political power within the plenary

control of the Executive and Legislative Branches. Consular venue determinations play an important role in the formulation of immigration policy relating to exclusion and admission. Diplomatic, management, and security considerations may well be brought to bear in the Department of State's decisions as to where visa applications shall be accepted from nationals of certain countries. See p. 24, *supra*; see also pp. 37-38, *infra*.

Congress's action in 1961 to eliminate APA review of exclusion and deportation orders compels the conclusion that no APA review is available in this case. Indeed, the fact that Congress expressly authorized some non-APA judicial review for particular classes of immigration determinations (exclusion and deportation orders affecting aliens physically present in the United States) strongly indicates that it intended to preclude APA review at the behest of aliens residing abroad. With respect to exclusion orders in particular, it was of great importance to Congress that aliens challenging their exclusion be remitted to the remedy of habeas corpus, which requires that the alien be physically present in the United States and in the custody of United States authorities.[20] See p. 27, *supra*. It is difficult to believe that Congress would have allowed aliens to evade the prerequisite of custody by challenging exclusion policies from abroad.[21] "In the context of the

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[20] Aliens in the custody of United States authorities outside the territorial jurisdiction of the United States have no right to challenge their confinement in habeas corpus proceedings. See *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950); cf. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269, 271, 273-275 (1990).

[21] Cf. *Heckler* v. *Ringer*, 466 U.S. 602, 623-625 (1984) (holding that, under the Social Security Act's judicial review provisions for Medicare Part A reimbursement decisions, a party cannot obtain review of an HHS regulation governing reimbursement for a medical procedure before a claim for reimbursement is filed, and acknowledging that,

statute's precisely drawn provision, the omission [of judicial review for aliens residing abroad] provides persuasive evidence that Congress deliberately intended to foreclose further review of [their] claims." *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). See also *United States* v. *Fausto*, 484 U.S. 439, 448-449 (1988); *Haitian Refugee Center, Inc.* v. *Baker*, 953 F.2d 1498, 1506-1507 (11th Cir.), cert. denied, 502 U.S. 1122 (1992).

3. Apparently appreciating the obstacles to finding a right of judicial review at the behest of the aliens themselves, the court of appeals "decline[d] to reach" that issue, and instead found a right to review at the behest of the United States citizens sponsoring the aliens' admission. Pet. App. 5a-6a. It is unlikely, however, that Congress would have precluded judicial review at the behest of an alien residing abroad, and yet at the same time would have afforded such review to a United States citizen relative—or to an employer seeking to sponsor an alien's admission, see 8 U.S.C. 1154(a)(1)(D)—who is less directly affected by consular decisions and policies. Indeed, in the consular nonreviewability cases, the courts have made no distinction between aliens seeking review of adverse consular decisions and the United States citizens sponsoring their admission; they have held that judicial review is unavailable to both.[22]

A necessary premise for the court of appeals' conclusion that United States relatives have standing is that the statutory provisions on which respondents rely afford greater rights to the United States sponsors than to the

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under that construction, a party would have to undergo the medical procedure in order to test the validity of the regulation).

[22] See *City of New York* v. *Baker*, 878 F.2d at 512; *Li Hing of Hong Kong, Inc.* v. *Levin*, 800 F.2d at 970; *Wan Shih Hsieh* v. *Kiley*, 569 F.2d at 1181.

aliens themselves with respect to the aliens' application for a visa. Nothing in the text or structure of the INA supports that proposition. While the INA affords a United States citizen a right to file a petition with the Attorney General to have the alien abroad classified as having the relationship that is a necessary condition for issuance of a preference or immediate relative visa (see 8 U.S.C. 1154(a); 8 C.F.R. 204.1(a)), the sponsoring citizen's cognizable interest terminates when that petition is approved. The INA affords the citizen-sponsors no rights in connection with visa determinations affecting aliens abroad, or with exclusion proceedings concerning aliens who have reached our shores. See 8 U.S.C. 1105a(b) (any "alien" against whom a final order of exclusion has been made may obtain judicial review of such order by habeas corpus proceedings); 8 U.S.C. 1226(b) ("alien" may appeal to Attorney General from decision of special inquiry officer).

The court of appeals' premise is similar to the proposition that was rejected in *Fiallo* v. *Bell*, 430 U.S. 787 (1977). In that case, the Court rejected a constitutional challenge to the statutory immigration preference for the alien mothers, but not fathers, of illegitimate children who are United States citizens or lawful permanent residents. The Court noted that the plaintiffs in that case contended that, "since the statutory provisions were designed to reunite families wherever possible, the purpose of the statute was to afford rights not to aliens but to United States citizens and legal permanent residents." *Id.* at 793. The Court found nothing to suggest that "Congress has anything but exceptionally broad power to determine which classes of aliens may lawfully enter the country," and it noted that it had "resolved similar challenges to immigration legislation based on other constitutional rights of citizens, and ha[d] rejected the suggestion that more searching judicial scrutiny is required." *Id.* at 794.

The court of appeals relied on its prior decision in *Abourezk* v. *Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), aff'd by an equally divided Court, 484 U.S. 1 (1987), for the proposition that United States citizens have a right to review under the APA of consular visa decisions. In *Abourezk*, the D.C. Circuit relied on two sources of authority to conclude that such review was available. First, it noted that this Court, in *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), had resolved the merits of a First Amendment challenge brought by United States citizens to a decision by the Attorney General not to grant a waiver to an excludable alien who resided abroad and had sought a nonimmigrant visa. See 785 F.2d at 1050. *Kleindienst*, however, is distinguishable from this case precisely because it involved a challenge regarding the constitutional rights of United States citizens—specifically, a claim that the denial of a visa to an alien abroad violated the First Amendment rights of the citizens to receive information. In light of the serious constitutional questions that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim brought by a United States citizen, this Court has articulated a very strong presumption that constitutional claims may be heard in the federal courts. See *Webster* v. *Doe*, 486 U.S. 592, 603 (1988). In this case, however, no claim of a violation of the constitutional rights of United States citizens was before the court of appeals.[23]

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[23] In *Abourezk*, the plaintiffs raised both statutory and constitutional challenges to the visa denials at issue in that case. The court believed itself obligated to consider the statutory issues in order to avoid reaching the constitutional questions. See 785 F.2d at 1052 (quoting *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). This case, however, is unlike *Abourezk* in that here it is not necessary to construe a statute in order to determine whether a

Second, the *Abourezk* court relied on a jurisdictional provision in the INA, 8 U.S.C. 1329, which states that the district courts "shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter [of the INA]." See 785 F.2d at 1050; see also *Karmali* v. *INS*, 707 F.2d 408, 409-410 (9th Cir. 1983). To the extent that *Abourezk* relied on Section 1329 to find a right of review, it was mistaken. Section 1329 is only a jurisdictional statute; unlike the APA, it does not provide a cause of action. It therefore no more furnishes a basis for judicial review than does, for example, the general federal-question jurisdictional statute, 28 U.S.C. 1331. Cf. *Califano* v. *Sanders*, 430 U.S. 99 (1977). If there is a right of review, it must be in the APA; but, as we have explained, the INA precludes whatever review would otherwise be available under the APA.[24]

4. Respondents argue (Br. in Opp. 21) that the principles discussed above do not bar judicial review of their claim because they are not seeking review of a specific consular visa decision; rather, they are challenging a policy that affects where such determinations will be made. The principles we have discussed, however, are not

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constitutional challenge to an application of that statute has merit. Cf. *Abourezk*, 785 F.2d at 1062-1063 & n.1 (Bork, J., dissenting).

[24] Section 1329 was enacted as part of the Immigration and Nationality Act of 1952. See Act of June 27, 1952, ch. 477, Tit. II, § 279, 66 Stat. 230. The legislative history does not indicate the reason for its enactment, but it may have been deemed necessary because of the then-existing amount-in-controversy requirement of the general federal-question statute. See *Acosta* v. *Gaffney*, 558 F.2d 1153, 1156 (3d Cir. 1977). This Court has never suggested that Section 1329 provides a right of review independent of any that might be available under the APA. Had such an argument been considered a reasonable reading of Congress's intent in the 1952 immigration act, it would surely have been made in *Tom We Shung* and *Pedreiro*, which held that the 1952 law made exclusion and deportation orders reviewable under the APA.

limited to the specific doctrine of consular nonreviewability, although they certainly are the basis for it. They are broader, for they reflect this Court's understanding that, as a general matter, the Executive Branch's policy determinations in the exercise of the essentially political power of exclusion are not subject to judicial review, absent express authorization by Congress. The fact that this case does not challenge a specific decision to deny a visa to a specific individual is beside the point.

Thus, this case is not like *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986). In that case, the Court held that Congress had not intended to foreclose judicial review of the validity of an agency regulation establishing the method by which Medicare Part B benefits were to be calculated, even though it had precluded judicial review of administrative decisions of the amounts due to claimants in particular cases. See *id.* at 675-676. There, the Court was construing the statute in question against a background presumption of judicial review of administrative action, *id.* at 670, which, as we have argued, is not applicable here. The principle of judicial nonintervention in the power of exclusion rests not on a particular statute precluding judicial review, but on a broader understanding about the proper roles of the Branches of the national government in a political matter directly tied to relations with foreign countries.

Under respondents' theory—which gives controlling significance to the difference between individual visa decisions by consular officials and rules applicable to a category of visa applications—aliens residing abroad and their United States sponsors would be able to challenge, under the APA, State Department regulations applying substantive criteria for the grant or denial of a visa, even though the outcome of such a challenge could effectively dictate whether the plaintiff was entitled to receive a visa.

Such an outcome would undoubtedly have surprised the Members of Congress who, in enacting the 1961 immigration amendments, rejected the "fallacious doctrine" that aliens have a "right" to enter the United States that may be litigated in federal court. See p. 26-28, *supra*.[25]

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[25] Even if review is not precluded by the APA, we believe that neither respondent LAVAS (a legal-rights organization) nor the United States citizen-sponsor respondents in this case are within the "zone of interests" protected by the relevant provision of the INA. They therefore have no right of review under the APA, for they are not aggrieved "within the meaning of the relevant statute." See *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990); 5 U.S.C. 702. There is no indication that the non-discrimination provision of Section 1152(a)(1) was intended to advance the interests of legal-rights organizations. Cf. *INS* v. *Legalization Assistance Project*, 510 U.S. 1301, 1305 (1993) (O'Connor, J., in chambers). Sponsoring family members are also not within the zone of interests protected by Section 1152(a)(1). That anti-discrimination provision focuses on the person to whom a visa might be issued, not the sponsor, and it operates without regard for the basis on which an alien might qualify for an immigrant visa (such as a family preference). Any legally cognizable interest that the sponsor has in the admission process ends with the processing of his petition by the INS. Furthermore, while we have not presented redressability as a separate issue for review, we note that, although the alleged harm to the sponsors is prolonged separation from family members, the relief sought here will not necessarily redress that harm. Even if respondents were to prevail in this case, and the migrants' immigrant visa applications were then processed in Hong Kong, those visa applications could be denied. Because the alleged harm to the sponsors results "indirectly" from application of the consular venue rules to the mi-grants, it is "substantially more difficult" for the sponsors to show that "prospective relief will remove the harm." *Warth* v. *Seldin*, 422 U.S. 490, 505 (1975).

B. Consular Venue Determinations Are Committed By Law To The Discretion Of The Secretary Of State

Judicial review is not available in this case for a second reason: consular venue determinations are committed to the discretion of the Secretary of State by law. See 5 U.S.C. 701(a)(2). The Secretary decides where aliens shall apply for visas under the authority of 8 U.S.C. 1202(a), which provides that "[e]very alien applying for an immigrant visa and for alien registration shall make application therefor in such form and manner and at such place as shall be by regulations prescribed." Section 1202(a) "make[s] explicit the Secretary's authority to determine by regulations the place of immigrant visa application," and such consular venue regulations "have always been intended for the benefit of the Government, giving it the flexibility to decide where immigrant visa applications will be processed." 59 Fed. Reg. 39,954 (1994). Indeed, Section 1202(a) itself establishes no substantive standards for the exercise of the consular venue authority by the Secretary.

This Court explained in *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), that, under Section 701(a)(2), review under the APA is unavailable "where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* at 410 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). "[E]ven where Congress has not affirmatively precluded review, review [under the APA] is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). When an agency's decision "involves a complicated balancing of a number of factors which are peculiarly within its expertise," such that it is "impossib[le] [to] devise an adequate standard of review for such an agency action," review is

barred by 5 U.S.C. 701(a)(2). See *Lincoln* v. *Vigil*, 113 S. Ct. 2024, 2031-2032 (1993).[26]

The Secretary of State's policy decisions as to *where* immigrant visa applications may be filed and will be accepted involve exactly the kind of "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," such that there is no meaningful standard of review for a court to apply. Consular venue decisions rest on numerous diplomatic, security, and management considerations, all of which can change rapidly within a very short time.[27] The United States Government's decision to open a consulate often rests on diplomatic considerations; the United States, for example, does not have consulates in countries with which it lacks diplomatic relations, and the number of United States consulates in a particular country may well reflect the current state of relations with that country. Moreover, "the [State] Department frequently has to adjust its handling of the visa workload because of world events." 59 Fed. Reg. 39,954 (1994).

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[26] The Court's decision in *Lincoln* v. *Vigil* also notes that certain kinds of agency actions have been "*traditionally* regarded as committed to agency discretion." 113 S. Ct. at 2031 (emphasis added). Consular venue rules surely fall in that category, for they have traditionally been regarded as existing primarily for the benefit of the government, to give consular officials flexibility to decide where immigrant visa applications will be processed. 59 Fed. Reg. 39,954 (1994). And, as our discussion of the doctrine of consular nonreviewability shows (pp. 24-25, *supra*), consular decisions to deny visas have always been regarded as matters inappropriate for judicial review.

[27] For that reason, although the State Department's current consular venue regulation presumptively provides that an alien shall apply for an immigrant visa in the consular district having jurisdiction over his residence, it also reserves to the Department the authority to direct otherwise. See 22 C.F.R. 42.61(a).

Security considerations are also of great importance in determining where immigrant visa applications will be accepted, in at least two regards. First, even if the United States has diplomatic relations with a country, the security situation in that country may be such that the State Department deems it inadvisable to send consular officials there, and the Department may require nationals of that country to apply for immigrant visas elsewhere.[28] Second, when applications from nationals of a particular country raise security concerns (as, for example, with terrorism), it is particularly important for those applications to be reviewed by consular officials with expertise about local conditions. See 59 Fed. Reg. at 39,954.

Management concerns also play a considerable role in determining where immigrant visa applications shall be accepted. The State Department cannot have consular officials available to accept visa applications in every major population center in every country, and so the Department must balance resource constraints against the desire to make the visa application process reasonably convenient for aliens seeking to apply for admission. Demand for visa applications fluctuates, even without regard to changes in political events, and the Department needs flexibility in responding to such fluctuations.

Respondents contend that, whatever the extent of the Department's discretion in setting consular venue policies, those policies cannot be based on any of the factors that Section 1152(a)(1) makes legally impermissible considerations with regard to the decision to grant or deny a visa, including nationality. By their very nature, however, consular venue rules often take account of nationality, and there is no meaningful standard for a

[28] Such is currently the case with immigrant visa applications from Lebanese nationals. See p. 24 n.16, *supra*.

court to determine whether those rules impermissibly "discriminate" on that basis. For example, assume that the United States has three consulates in Russia at which immigrant visa applications are accepted (two of which accept applications only from Russian citizens), but that it has only one consulate in China that accepts immigrant visa applications. Such a difference might be attributable to the current state of the United States' diplomatic relations with those two countries, or to current demand for visas, or to special processing requirements made necessary for security reasons. Whatever the reasons, the practical effect might well be that it was significantly more difficult for Chinese citizens to apply for immigrant visas than it would be for Russian citizens. It would be impossible, however, to fashion a standard to determine whether that difference constituted "discrimination" on the basis of nationality, since the difference would be attributable to legitimate concerns peculiarly within the State Department's expertise and discretion. Indeed, any attempt to make such a judgment would impinge on the Executive Branch's policy-making discretion in sensitive areas involving foreign relations.[29] See also *Haitian Refugee Center*, 953 F.2d at 1507-1508.

[29] 5 U.S.C. 702(1) authorizes the court to dismiss an APA action "on any other appropriate legal or equitable ground," including the possibility that the action might require the court "to decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action." See *Sovereign Immunity: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 135 (1970) (report of the Administrative Conference on Judicial Review). That report of the Administrative Conference led to the 1976 amendments to the APA, including the relevant portion of Section 702(1). See H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 3 (1976).

II. THE CONSULAR VENUE POLICY CHALLENGED IN THIS CASE DOES NOT VIOLATE THE ANTI-DISCRIMINATION RULE OF 8 U.S.C. 1152(a)(1)

A. Section 1152(a)(1) Does Not Apply To Consular Venue Rules

Even if judicial review of consular venue determinations is available, the decision of the court of appeals should nonetheless be reversed, for it is premised upon a legally incorrect construction of 8 U.S.C. 1152(a)(1). That subsection provides in pertinent part:

> [N]o person shall receive any preference or priority or be discriminated against *in the issuance of an immigrant visa* because of the person's race, sex, nationality, place of birth, or place of residence.

(Emphasis added.) The panel majority believed that Section 1152(a)(1) governs consular venue decisions and prohibits the Secretary of State from making any distinctions based on nationality in deciding where immigrant visa applications shall be accepted. That construction of Section 1152(a)(1) is erroneous.[30]

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[30] Both Houses of Congress have approved bills that would correct the court of appeals' erroneous construction of Section 1152(a)(1). Both Houses have passed an amendment to Section 1152(a)(1) that would provide: "Nothing in [paragraph (1)] shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed." See H.R. 2202, § 803, 104th Cong., 2d Sess. (1996) (passed by the House of Representatives on Mar. 21, 1996, see 142 Cong. Rec. H2639-H2640 (daily ed. 1996)); H.R. 2202, § 172, 104th Cong., 2d Sess. (1996) (passed by the Senate on May 2, 1996, see 142 Cong. Rec. S4611 (daily ed. 1996). Those provisions are part of broader House and Senate immigration bills currently pending before a House-Senate Conference Committee. We will advise the court of any further pertinent developments regarding the legislation.

1. Section 1152 establishes a uniform annual numerical limit on immigrant visas for nationals of each foreign country, expressed as a percentage of all immigrant visas made available for aliens seeking admission to the United States.[31] Subsection (a)(1) provides that, beyond those numerical limits, a consular officer is not permitted to take into account the applicant's race, sex, nationality, place of birth, or place of residence when deciding whether to grant or deny an immigrant visa. That is the import of the Section's prohibition against certain discrimination "in the *issuance* of an immigrant visa."

Nothing in Section 1152 suggests that the prohibition applies to other aspects of the visa application process, including consular venue. Indeed, a separate part of the INA, 8 U.S.C. 1202(a), speaks directly to consular venue. Under Section 1202(a), the authority to determine where a visa application will be processed has been vested in the discretion of the Secretary of State. Section 1202(a) expressly provides that an alien "applying for an immigrant visa * * * shall make application therefor in such form and manner and at such place as shall be by regulations prescribed." Section 1202(a) does not, however, contain any prohibition against discrimination based on nationality similar to that in Section 1152(a). That omission is significant, for "[w]here Congress includes particular language in one section of a statute but omits it in another

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[31] Under Section 1152(a)(2), the total number of immigrant visas for any single foreign country may not exceed seven percent of the total number of immigrant visas based on family and employment preferences that are available during any fiscal year. 8 U.S.C. 1152(a)(2); see 8 U.S.C. 1153(a) and (b). That per-country limit is subject to an important qualification for spouses and children of lawful permanent resident aliens. See 8 U.S.C. 1152(a)(4). With certain exceptions, an applicant is assigned to the country of his or her birth for the purpose of applying the seven-percent limit. See 8 U.S.C. 1152(b).

* * * it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2040 (1993). Examination of the INA as a whole therefore demonstrates that Section 1152(a)(1) does not apply to consular venue. See *Beecham* v. *United States*, 114 S. Ct. 1669, 1671 (1994) ("The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences[.]").

A construction of Section 1152(a)(1) as extending to consular venue determinations made under the distinct authority of Section 1202 would be unworkable. Under respondents' analysis, none of the factors listed in Section 1152(a)(1), including the alien's "place of residence," could be considered in establishing consular venue rules. Thus, if respondents' construction were adopted, the State Department could not require aliens to apply for visas in their place of residence. See 22 C.F.R. 42.61(a). But the State Department has historically required most aliens to apply for immigrant visas at their place of residence, for there has always been "profound concern that an alien not avoid meaningful examination * * * by having the visa application processed by a consular office in an area remote from his or her country of residence." 59 Fed. Reg. 39,954 (1994).

2. The court of appeals believed the plain language of Section 1152(a)(1) supported its conclusion (see Pet. App. 8a-9a), but that language will not bear the construction that the panel placed on it. Section 1152(a)(1) governs only the "issuance" of a visa. The common understanding of the term "issuance" plainly indicates that it is used in Section 1152(a)(1) to refer to the ultimate grant of a visa by a consular officer, not to every aspect of the process by which the State Department determines whether the visa should be granted or denied. It strains the meaning of

"issuance" of visa to suggest that the term includes all the procedures for processing an immigrant visa application.[32]

The placement of the anti-discrimination rule within Section 1152 strongly indicates that the court of appeals' construction is mistaken. Congress placed the prohibition in a section of the INA that addresses numerical limitations on visa issuance. Had Congress intended to enact a general bar against nationality-based distinctions in the exercise of all functions relating to decisions whether to admit or exclude aliens seeking to immigrate, it would have enacted such a bar as a general provision of the INA, rather than as a subpart of a subsection speaking to the implementation of the nationality-based numerical limitations for the issuance of immigrant visas.

The background of Section 1152(a)(1) is consistent with our construction. The anti-discrimination language was added to Section 1152 in 1965 (see Pub. L. No. 89-236, § 2, 79 Stat. 911) as part of Congress's abandonment of the old immigration system which employed national-origin quotas. Congress replaced the system of numerical limitations for immigration from particular countries with a system of uniform per-country percentage limits that provides (subject to certain exceptions) for "issuance of immigrant visas without regard to national origin." See H.R. Rep. No. 745, 89th Cong., 1st Sess. 19 (1965); *id.* at 9, 10-13, 17; see also S. Rep. No. 748, 89th Cong., 1st Sess. 12-13, 21-22 (1965). Accordingly, Section 1152 addresses the

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[32] A leading dictionary defines "issue" to mean "officially putting forth, or getting out or printing * * * or making available or distributing * * * *or giving out or granting (as licenses)* or proclaiming or promulgating (as a written order or directive)." *Webster's Third New International Dictionary* 1201 (def. 9(a)(1)) (1986) (emphasis added). See also *Black's Law Dictionary* 830 (6th ed. 1990) (similarly defining "issue" to mean "[t]o send forth; to emit; to promulgate; as an officer issues orders").

subject of relative "preference" or "priority" (and reciprocal disadvantage or "discrimination") in the allocation of immigrant visas by making clear that the uniform percentage limit applicable to immigration from each country is the only limit that may be placed on the number of immigrant visas that may be granted to nationals of any country. Nothing in the background of Section 1152(a)(1) suggests that Congress intended it to have a broader reach.

Nationality distinctions have long played a significant and legitimate role in the application of our immigration laws, and they continue to play such a role.[33] Indeed, even though Congress has generally prohibited consular officers from discriminating in individual visa decisions on the basis of nationality, Congress itself has enacted into law several special nationality-based immigration preferences, reflecting foreign policy concerns of the United States.[34] In exercising "the Nation's sovereign power to admit or exclude foreigners in accordance with perceived national interests" (*Fiallo*, 430 U.S. at 795 n.6), Congress has simply not prohibited the State Department from establishing consular venue rules based on the nationality of the aliens seeking admission to the United States.

3. Finally, while we believe that the meaning of "issuance" in this context is plain, if there is some

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[33] See *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Matthews* v. *Diaz*, 426 U.S. 67, 78-80 (1976); see also *Narenji* v. *Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (upholding registration requirements for Iranian students), cert. denied, 446 U.S. 957 (1980); 8 C.F.R. 212.1 (nationality-based visa and passport requirements for nonimmigrants).

[34] See, *e.g.*, Immigration Act of 1990, Pub. L. No. 101-649, § 103, 104 Stat. 4985 (setting aside visas for natives of Hong Kong); § 134, 104 Stat. 5001 (special visas for Tibetans); Soviet Scientists Immigration Act of 1992, Pub. L. No. 102-509, 106 Stat. 3316 (special admission rules for scientists from the former Soviet Union).

ambiguity in that term, the court of appeals should have deferred to the State Department's reasonable construction of it, under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). State Department officials are responsible for carrying out the functions of processing visa applications and issuing visas. Since Congress certainly did not express "a specific intention" (*id.* at 845) that Section 1152(a)(1) should apply to consular venue rules, the State Department was responsible for making the determination as to the scope of that Section. "In such a case, a court may not substitute its own construction of [the] statutory provisions for a reasonable interpretation made by the administrator of [the] agency." 467 U.S. at 844.[35]

B. The Consular Venue Policy Challenged In This Case Does Not Discriminate On the Basis of Nationality

Even if we assume that the anti-discrimination rule of Section 1152(a)(1) applies to consular venue rules, it is nonetheless the case that the rule challenged in this case does not violate it.

In the first place, as Judge Randolph noted (Pet. App. 15a), "it is not nationality that precludes visa processing" in Hong Kong. The distinction drawn by the State Department's policy is not between Vietnamese and other nationals, but between migrants in Hong Kong and other countries who have been screened out under the CPA, and all other persons, regardless of their nationality. A Vietnamese national who resides legally in Hong Kong (for example, a Vietnamese businessman who is living there

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[35] Under 8 U.S.C. 1103, the Attorney General may issue a controlling determination with respect to questions of law that arise in the administration of the INA, even with respect to functions administered by State Department officials, but she has not done so with respect to Section 1152(a)(1).

for an extended period)—and indeed a Vietnamese national other than a screened-out migrant who resides in Hong Kong illegally—may submit an immigrant visa application to be processed by the Consulate General in Hong Kong.[36] The same is true of a Vietnamese national who has been "screened-in" under the CPA screening process and has therefore been determined to be potentially eligible for refugee status.

Respondents do not contest that the CPA itself is a valid international undertaking on the part of the United States and other interested countries. The consular venue rule that respondents challenge is tied directly to the CPA and to the categories of aliens affected by it, and it therefore cannot be thought to violate the non-discrimination provision of Section 1152(a)(1). Cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 76-79 (1981); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 175-181 (1979).

Respondents have argued, however, that the policy nonetheless discriminates on the basis of nationality because (they contend), even among aliens illegally present in first-asylum countries, it is only Vietnamese nationals who must return to their home country to apply for immigrant visas. As a factual matter, that contention is misleading; the CPA was adopted to address a broader problem than that of Vietnamese migrants, including Laotian migrants, and its imperative of repatriation of screened-out migrants is not limited to Vietnamese nationals. See J.A. 40, 185, 193-194.[37]

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[36] Absent directives to the contrary, the State Department's consular venue regulation permits an alien to apply for an immigrant visa "at the consular district having jurisdiction over the alien's place of residence." 22 C.F.R. 42.61(a).

[37] We pointed out in the *Lisa Le case* that the policy against processing visa applications in Hong Kong from screened-out migrants applies also to Laotian migrants. Consular officials in Hong Kong were not aware of any screened-out Laotian migrants in Hong Kong who had sought to apply for immigrant visas to the United States, however. Leininger Aff. ¶ 16 (June 14, 1995) (lodged with the Clerk of this Court). The majority of Laotian migrants are in Thailand, and the United States embassy in Thailand advises screened-out migrants there to return to Laos and apply for immigrant visas in Vientiane, Laos. Sykes Aff. ¶ 4 (June 15, 1995) (lodged with the Clerk). See also Hancock Aff. ¶ 6 (June 14, 1995) (lodged with the Clerk).

Even if we put that factual point aside, the more fundamental flaw with respondents' argument is that there are no other nationals in Hong Kong who are similarly situated to the screened-out Vietnamese but are treated differently. The CPA is a unique, but precedent-setting, arrangement established to resolve claims to refugee status amidst a mass migration crisis. Nowhere else is there such a screening process in place. In conjunction with the other signatories to the CPA (and in response to their objections), the State Department adopted the policy against processing screened-out migrants' immigrant visa applications to address a particular problem in a particular place.

The policy at issue here reflects no animus against Vietnamese nationals; to the contrary, Vietnamese nationals have been among the greatest beneficiaries of United States immigrant visas in recent years. See Pet. 19. The policy that respondents challenge instead is tailored to address a very specific problem involving migration of nationals primarily of one country, without precise parallel elsewhere. The policy could, of course, be adapted for future migration crises, but even in those situations, the crises would quite likely involve nationals of only one country, or a few countries.

The question then is whether the State Department is prohibited from adopting consular venue rules affecting nationals of a particular country precisely *because* inter-

nal conditions in that country have created a migration crisis. We submit that the answer must be no. These are situations where the State Department may conclude that nationals of a particular country constitute "a legitimate class of one." Cf. *Nixon* v. *Administrator of General Servs.*, 433 U.S. 425, 472 (1977). A contrary holding would deprive the United States of an effective tool in deterring massive migration, a situation that creates extraordinary dangers to human life. It would also hobble the State Department in its effort to induce voluntary repatriation of migrants who are not refugees—and contrary to respondents' submission, it could well perpetuate, rather than alleviate, the anxiety and instability created by the extended stay of migrants in countries of first asylum, whose patience with the presence of those migrants may wear thin.

Finally, there has been absolutely no showing in this case that the challenged consular venue policy has any discriminatory *effect* on the "issuance" of immigrant visas, which is, after all, the subject directly addressed by Section 1152(a)(1). See p. 47, *supra*. Thus, a necessary premise of respondents' discrimination claim—that the Department's policy adversely affects the issuance of immigrant visas to Vietnamese nationals—is absent, and the discrimination claim cannot be sustained under any theory.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
MICHAEL JAY SINGER
ROBERT M. LOEB
Attorneys

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether the State Department violated 8 U.S.C. § 1152(a)(1), which prohibits discrimination on the basis of nationality in the issuance of immigrant visas, when it adopted a policy requiring Vietnamese nationals residing in Hong Kong who seek visas under a congressionally established family reunification program to return to the Socialist Republic of Vietnam to have their visas processed and issued, while not imposing a comparable requirement on nationals of other countries.

2. Whether, in the absence of a congressional delegation of authority, in adopting such a policy, the State Department unconstitutionally discriminated on the basis of national origin against U.S. citizens in the exercise of their congressionally conferred right to be reunited in the United States with their immediate families.

3. Whether the State Department's adoption of such a policy was arbitrary and capricious in violation of 5 U.S.C. § 706(2) where (a) the new policy was an unexplained and sudden reversal of the visa issuance policy the Department had followed in Hong Kong for over 14 years, (b) the new policy was in violation of the Department's regulations in effect at the time and was a departure from the Department's consistent practice for over 40 years regarding the place of visa processing and issuance, and (c) the Department's *post hoc* justification for the new policy contradicted the Department's earlier statements.

4. Whether a U.S. citizen and his Vietnamese national daughter who are adversely affected and aggrieved by the Department's policy reversal may seek judicial review under the APA of their claims that the Department's new policy violates the anti-discrimination prohibition of 8 U.S.C. § 1152(a)(1), exceeds the Department's statutory authority under the INA, and was arbitrary and capricious in violation of 5 U.S.C. § 706(2), where nothing in the INA expressly precludes such judicial review.

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Respondents Legal Assistance for Vietnamese Asylum-Seekers, Inc. ("LAVAS"), Em Van Vo ("Mr. Vo") and Truc Hoa Thi Vo ("Ms. Vo") request that this Court affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves § 202(a)(1) of the Immigration and Nationality Act of 1952 ("INA"), as amended, 8 U.S.C. § 1152(a)(1); the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702 and 706(2); and the Fifth Amendment of the United States Constitution. These provisions are set forth in the attached statutory appendix.

STATEMENT OF THE CASE

Hong Kong's Detention And Screening Of The Boat People. Since April 1975, when North Vietnamese forces captured Saigon, large numbers of refugees have escaped political oppression and economic privation in the Socialist Republic of Vietnam ("Vietnam") by taking a dangerous journey across the open sea to Southeast Asia and Hong Kong. JA 67-69. For nine years, from June 1979 until June 1988, the treatment of these Vietnamese "boat people" was guided by an informal arrangement under which Hong Kong and other nations in the region granted the boat people temporary refuge ("first asylum") in exchange for a commitment from the United States and other western countries to resettle them. As part of this agreement, the Hong Kong Government ("HKG") accorded the boat people presumptive refugee status. JA 68.

This relatively benign treatment of the boat people changed dramatically in 1987-88, when a new wave of refugees fled Vietnam. The HKG responded by announcing that as of June 16, 1988, it was revoking the presumptive refugee status of Vietnamese boat people, and that all new arrivals would be detained and screened by local immigration authorities to determine on a case-by-case basis whether they qualified for refugee status. JA 69. One year later, in June 1989, the screening program was memorialized in an informal multilateral

arrangement known as the Comprehensive Plan of Action ("CPA").[1]

Thus, since 1988, the HKG has regarded newly arriving boat people as illegal aliens and has placed them in large prison-like detention centers surrounded by high chain link fences topped with rolls of barbed concertina wire. JA 71. These squalid detention centers are characterized by intense overcrowding, complete lack of privacy, unremitting boredom, extreme noise and heat, and the constant threat of rape, robbery, extortion, and other forms of physical violence. JA 71; JA 159-62.

The State Department's Practice Prior To April 1993. Since at least 1979, the United States has permitted Vietnamese boat people to enter the United States on either of two tracks: as refugees under the criteria later codified in the Refugee Act of 1980, Pub. L. 96-212, or as beneficiaries of immigrant visas under the criteria set forth in the INA, 8 U.S.C. §§ 1151-1156. JA 68-69; JA 106-07. This case relates only to the immigrant visa track.

The immigrant visa ("IV") option is available to the relatively small number of boat people who are sponsored to immigrate to the United States by a spouse, parent, child or sibling who is a citizen or permanent resident of the United States. In order to obtain an IV, the sponsoring U.S. citizen or lawful permanent resident (known as the "petitioner") must file a petition (Form I-130) with the Immigration and Naturalization Service ("INS"). 8 C.F.R. § 204.1(a) (1996). If the INS approves the petition, the alien visa applicant—the "beneficiary" of the petition—must submit to the State Department an application for an IV. 22 C.F.R. § 42.63(a) (1996). Once the visa application is deemed "current," the beneficiary must provide various documents to and must appear at a U.S. consulate for final processing of the visa

[1] The CPA has no formal legal status, having never been submitted to the U.S. Senate for confirmation nor made the subject of an Executive order. JA 69-70. Under its terms, if the immigration authorities of a first asylum state like Hong Kong determine that a Vietnamese applicant qualifies for refugee status, the United States is committed to work with other resettlement countries to assure his or her resettlement. With regard to Vietnamese boat people who are "screened out," however, the CPA expresses the position that they should return to their country of origin. JA 70.

application, including an interview before a consular officer, who must determine whether to grant the visa. 22 C.F.R. § 42.62(a).

For nearly 14 years, from June 1979 until April 1993, the Department, in accordance with the INA, processed IV applications for Vietnamese boat people in Hong Kong at the Consulate in that jurisdiction, whether or not their status was "illegal" (*i.e.*, screened out or not yet screened) under HKG immigration procedures. JA 68-69; JA 106-08; JA 116. This practice was consistent with the State Department regulations then in effect, which required that Department officials conduct an applicant's IV interview "in the consular district in which the alien resides" or in which he is "physically present." 22 C.F.R. § 42.61.[2] It is not disputed that respondent Ms. Vo and the other detained boat people are "residents" of Hong Kong within the meaning of the INA and both the former and the recently amended regulations. *See* 8 U.S.C. § 1102(a)(33) ("residence" is "the place of general abode," which, in turn, is defined as a person's "principal, actual dwelling place in fact, without regard to intent").

The implementation of the screening policy in Hong Kong in June 1988 and the adoption of the CPA in June 1989 did not alter the Department's practice. The Department continued to process Vietnamese IV applicants at the U.S. Consulate in Hong Kong, whether or not they had been "screened-in" as refugees by the HKG. JA 68-69; JA 134-35. In a cable dated December 14, 1990, the Department explained that to require the beneficiaries of current IV petitions who had been screened-out or who had not been screened-in to return to Vietnam for visa processing "strikes the Department as *procedural overkill and not at all necessary to preserve the integrity of the CPA*." JA 115-16 (emphasis added).

The State Department's April 1993 Policy Shift. In April 1993, the Department abruptly, and without notice to IV petitioners or beneficiaries, reversed its practice of processing IV applications for Vietnamese boat people at the U.S. Consulate in

[2] In response to this litigation, the Department amended its regulations on September 6, 1994 to give itself discretion to deny IV beneficiaries the right to have their visa applications processed in the place in which they reside or are physically present. 59 Fed. Reg. 39,555 (1994); 22 C.F.R. § 42.61(a) (1996). The 1993 and current regulations are set forth in the statutory appendix.

Hong Kong. JA 109; JA 150-51. Under the new practice, the Department refuses to process the current IV applications of any Vietnamese boat person who is illegally in Hong Kong, *i.e.*, who has not been "screened-in" by the HKG as a political refugee. In a letter to the HKG, the U.S. Consulate described the new policy as follows:

> We have received clear instructions from the Department of State in Washington, D.C., that we are only authorized to process the immigrant visa cases of persons recognized as refugees. We may not process the immigrant visa request of anyone awaiting a screening decision. We also may not process the case of anyone screened-out as a refugee. This stipulation holds regardless of whether the person in question is a beneficiary of a current U.S. visa petition.

JA 78-79.

In approximately December 1993, eight months after the change in policy, the U.S. Consulate started notifying current Vietnamese IV beneficiaries that they could not be processed in Hong Kong. JA 75. The standard letter stated:

> The U.S. government supports the [CPA] . . . Under the CPA, those not recognized as refugees . . . must return to Vietnam to pursue resettlement in a third country. You have not been granted refugee status. Since you have been screened out, you must therefore return to Vietnam.

JA 82-91. The Department's reliance on the CPA was perplexing, since "all major resettlement countries," including Canada, Australia, Great Britain and the HKG itself (which has always cooperated with the U.S. Consulate's requests to interview detained IV applicants), did not consider the CPA a bar to processing immigrant visa applications in Hong Kong. JA 116-17. Although the CPA expired on June 30, 1996, the Department's policy remains in effect. Pet. Br. at 4.

The Department's requirement that boat people return to the country from which they fled left them without any viable option. A boat person who returns to Vietnam to have his IV application processed by a U.S. Consulate there will have that effort hampered by difficult, costly, corrupt and time consuming bureaucratic obstacles. JA 77; JA 116; JA 153-58. In a related case, the district court found that "substantial doubt" exists as to whether a

returnee to Vietnam will ever be able to "secure an exit visa" from the Hanoi regime. *Vo Van Chau v. United States Dep't of State*, 891 F. Supp. 650, 656 (D.D.C. 1995), *appeal dismissed as moot*, Order, No. 95-5205 (D.C. Cir. Oct. 19, 1995). *See also* JA 137-38; JA 143-46; JA 157. Even if they could have their visas processed in Vietnam without encountering any but the normal obstacles, the full process takes at least one year to complete, prolonging their separation from their U.S. family sponsors. JA 158. During this time, the returning applicants—who will have cut all of their ties with Vietnam before they fled and who may have no family to return to—will endure emotional trauma, discrimination and severe economic hardship. JA 76; JA 153-58.

The Situation Of The Named Respondents. Mr. Vo is a U.S. citizen and the father of Ms. Vo. Following the fall of Saigon in April 1975, Mr. Vo was arrested by communist security forces and imprisoned for fifteen months in a re-education camp as a result of his former service with the South Vietnamese Navy. JA 58. In June 1979, Mr. Vo escaped Vietnam by boat and, shortly thereafter, resettled in the United States as a political refugee. His entire family, however, was left behind. *Id.* Twelve years later, in July 1991, Ms. Vo fled to Hong Kong, where she has been detained ever since with her husband and two young children. JA 59.

In September 1992, the State Department processed the IV applications of Ms. Vo's mother, brother and sister—all of whom had escaped to Hong Kong at about the same time she did—at the U.S. Consulate in Hong Kong, and permitted them to immigrate to the United States based on their relationship with Mr. Vo. JA 59.

In April 1993, the INS approved the IV petition that Mr. Vo had filed on Ms. Vo's behalf so that she and her children could reunite with the rest of the family in the United States. Later that month, Mr. Vo was informed that Ms. Vo—like her mother, brother and sister before her—would be interviewed by the U.S. Consulate in Hong Kong and, if found eligible for the visa, "action will be taken to arrange for [her] departure from Hong Kong." JA 61-62. On December 15, 1993, however, the U.S. Consulate, pursuant to the policy shift the Department had made eight months earlier in April, informed Mr. Vo that it would not process his daughter's IV application unless and until she returned to Vietnam. JA 60.

The Proceedings Below. On February 25, 1994, Mr. Vo and his daughter, together with other individual plaintiffs and LAVAS, brought this class action against the State Department, challenging its April 1993 decision to cease issuing immigrant visas in Hong Kong to Vietnamese nationals who, like Ms. Vo, reside in detention centers in Hong Kong and who, like Ms. Vo, have been authorized to immigrate to the United States by the INS. The complaint alleged that the Department's new policy violated the Department's regulations then in effect, which mandated visa processing in the consular district in which the applicant resides. Respondents also alleged that the 1993 policy violated § 1152(a)(1) of the INA, which prohibits "discrimination in the issuance of an immigrant visa because of the person's ... nationality," the equal protection guarantee contained in the Fifth Amendment of the Constitution, and § 706(2) of the APA. JA 13-28.

Following a hearing that consolidated respondents' motion for a preliminary injunction with the trial on the merits,[3] the district court on April 28, 1994, issued a final order granting the Department's motion for summary judgment and denying respondents' cross motion for summary judgment. Pet. at 28a. The district court rejected respondents' argument that the applicable regulations required the Department to process their visa applications in Hong Kong. Despite the plain language and the Department's own interpretation of the regulation, the district court held that the regulation made the decision whether to process respondents' visa applications in Hong Kong a "policy choice" that is "entitled to deference." Pet. at 27a. In a single sentence, the district court also found "meritless" respondents' arguments that the Department's policy violated 8 U.S.C. § 1152(a)(1), the APA and the Constitution. *Id.*

On February 3, 1995, the D.C. Circuit reversed, holding that the Department's April 1993 policy was discriminatory because it drew an explicit distinction between Vietnamese nationals and the

[3] No evidence was heard at the hearing, which consisted of oral argument on cross-motions for summary judgment. Earlier, the district court had prohibited respondents from taking limited documentary discovery of the Department's cable traffic relevant to the decision to refuse IV processing, and from deposing a key witness pursuant to Fed. R. Civ. P. 30(a)(2)(C). JA 29.

nationals of other states: the Department had instructed the Consulate not to process the "immigrant visa petitions of *Vietnamese nationals* residing illegally in Hong Kong." Pet. at 12a. The court held that such discrimination violated § 1152(a)(1) of the INA, which "unambiguously direct[s] that no nationality-based discrimination shall occur." Pet. at 11a.[4] The court rejected the Department's suggestion that the line drawn was a "permissible line between legal and illegal immigrants," noting that "[t]he Department has never contended ... that this change was made as to any other nationals than Vietnamese nationals, nor that illegally present nationals of other countries would be treated the same as illegally present Vietnamese nationals." Pet. at 11a-12a.

The court also rejected the Department's suggestion that it retains discretion under § 1152(a)(1) to discriminate on the basis of nationality so long as its policies are rationally related to U.S. foreign policy interests. The court reasoned:

> Congress could hardly have chosen more explicit language. While we need not decide in the case before us whether the State Department could never justify an exception under the provision, such a justification, if possible at all, must be most compelling—perhaps a national emergency. We cannot rewrite a statutory provision which by its own terms provides no exceptions or qualifications simply on a preferred "rational basis."

Pet. at 9a. Having ruled in respondents' favor on the INA issue, the court did not address respondents' fully briefed APA and constitutional arguments.

The Department filed a petition for rehearing and suggestion for rehearing *in banc*. After remanding the record to the district court for a determination on a newly raised issue of mootness, the court of appeals on February 2, 1996, held that the case was not moot and denied the petition for rehearing. Pet. at 40a. On February 12, 1996, the full court denied the Department's suggestion for rehearing *in banc*. Pet. at 51a. The Department

[4] The D.C. Circuit concluded that the Department's amendment of its regulations in 1994 had rendered moot respondents' challenge based on the Department's consular venue regulations.

does not challenge before this Court the court of appeals' mootness determination.

SUMMARY OF ARGUMENT

I. Section 1152(a)(1) of the INA provides that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's sex, race, nationality, place of birth, or place of residence." The State Department is not free to ignore this legislative mandate simply because it considers its preferred policy administratively more feasible or more consistent with its own view of "foreign policy." Nevertheless, for just such reasons, the State Department refuses to process or issue at the U.S. Consulate in Hong Kong immigrant visas for Vietnamese nationals illegally in Hong Kong, and requires them to return to their country of origin to apply for and obtain their visas. Yet the Department permits nationals of other countries who are illegally in Hong Kong to apply for and obtain their visas at the Consulate in Hong Kong. As the court of appeals found, based on the Department's own statements, this policy draws "an explicit distinction between Vietnamese nationals and nationals of other countries," (Pet. at 9a), and thus discriminates against Vietnamese in the issuance of immigrant visas because of their nationality. Even if one accepts the Department's view that its policy is necessary to implement the CPA—a doubtful proposition—the policy necessarily has the express purpose of treating Vietnamese nationals differently from nationals of other states because, as the Department acknowledges, the CPA is directed at the "very specific problem" of the "migration of nationals primarily of one country," Vietnam. Pet. Br. at 47.

The Department claims that the term "issuance" refers only to the decisions of a consular officer to grant or refuse an immigrant visa to a specific individual, and thus that § 1152(a)(1) does not bar race, sex or nationality based discrimination at any other step in the process that comes before that decision. Nothing in the language or legislative history of § 1152(a)(1) supports this view. The statute prohibits "*discriminat[ion]* . . . in the issuance" of immigrant visas. However narrowly or broadly the word "issuance" is defined, discrimination in the process by which an IV beneficiary obtains a visa—*e.g.*, by imposing on a particular

race or nationality burdensome procedural requirements that make the procurement of such visas impossible or significantly more difficult—necessarily discriminates in the "issuance" of the visa. The Department's view would render § 1152(a)(1) entirely precatory: it would not prohibit discrimination at any point in the visa issuance process other than the consular officer's decision in a specific case; yet the consular officer's decision, according to the Department, would be unreviewable either by the Secretary or by the courts. If the Department were correct, the Secretary would be free to suspend indefinitely all processing of immigrant visas for a group of aliens purely on the basis of their race. This Court should construe § 1152(a)(1) in light of Congress' purpose to remove race, nationality and gender as a bar to family reunification, rather than in a manner that will deprive it of "operative effect."

II. The Department's policy violates the equal protection rights under the Fifth Amendment of Mr. Vo, a U.S. citizen. This case is unlike most immigration cases because it involves the rights of *U.S. citizens* to bring their immediate family members to the United States under a family reunification program established by Congress. The government may not unconstitutionally deprive citizens of the rights conferred by that program.

In singling out Vietnamese visa beneficiaries for discriminatory treatment, the Department's policy necessarily discriminates against their American sponsors on the traditionally "suspect" basis of national origin because (1) those sponsors almost invariably share the same national origin as their family members and (2) classifications that distinguish among American citizens on the basis of the race or national origin of family members are themselves constitutionally suspect. As such, the Department's classification is presumptively invalid, and the Department has the heavy burden of establishing that it is narrowly tailored to meet a compelling national interest. The Department does not even try to do so.

To be sure, this Court has long held that *Congress* has plenary and exclusive power in the formulation of immigration policy, including the power to make classifications concerning the admission of aliens that would be unconstitutional outside the realm of immigration. The Department is seriously in error,

however, when it says that the Executive Branch has the same power over immigration matters. The State Department has no constitutional authority to make such classifications, absent a clear delegation of such authority by Congress. Nothing in the language or the legislative history of the INA supports the conclusion that it grants to the Department the authority to discriminate on the basis of race, gender or national origin in the administration of the family reunification program. Both this Court and the government have acknowledged (*e.g.* in *Jean v. Nelson*) that a facially neutral provision of the INA vesting discretion in agency officials (like § 1202, granting the Department authority to make consular venue rules) does not authorize race, gender, national origin or nationality-based discrimination.

III. The State Department's 1993 policy shift was arbitrary and capricious. The Department processed in Hong Kong the IV applications of Vietnamese boat people for 14 years before it decided in April 1993 to stop doing so. The Department continued to process such applications after the CPA was adopted in June 1989, without regard to the IV beneficiary's status as "screened-in," "screened-out" or "unscreened." The pre-1993 policy was consistent with the Department's self-described "historical" practice of processing IV applications in the consular district in which the applicant resides. The Department's consular venue regulations as they existed from before the INA's enactment in 1952 to September 1994 (when the Department amended them in specific response to this lawsuit) *required* processing in Hong Kong. The only rationale the Department gave to explain its 1993 decision contradicts its own statement in 1990 that requiring screened-out IV beneficiaries to return to Vietnam for visa processing and issuance was "*not at all necessary to preserve the integrity of the CPA.*"

IV. The Department has not and cannot overcome the "strong presumption" that Congress intends judicial review of agency action, a presumption that this Court has applied consistently in cases arising under the INA. The fact that agency action may have foreign policy or political overtones does not divest the federal courts of their constitutional and statutory power to determine if agency action is outside of the agency's statutory authority, contrary to law, or arbitrary and capricious. The Department concedes that

nothing in the INA expressly precludes judicial review of the Department's discriminatory policy. The Department points to § 1105a of the INA, but that provision merely establishes a statutory review process for final orders of deportation and exclusion directed at individual aliens. The decisions of this Court and the courts of appeal make clear that § 1105a does not bar APA review of challenges to regulations and Department policies. Similarly, the doctrine of consular nonreviewability applies only to decisions by consular officers to grant or deny visas in specific cases, and, as numerous cases establish, does not preclude review of "general collateral challenges" to INS or State Department policies and procedures that touch upon the admission of aliens.

Although § 1202(a) of the INA grants rulemaking authority to the Secretary to establish the places at which visas will be processed, the Department's "consular venue" policies are not committed by law to its discretion, within the meaning of the "very narrow" exception to judicial review set forth in § 701(a)(2) of the APA. The statutory prohibition against discrimination in the issuance of immigrant visas necessarily limits the Department's discretion to engage in such discrimination. Even if the prohibition in § 1152(a)(1) were inapplicable, § 701(a)(2) bars judicial review only where Congress clearly intended to allow the agency to act without regard to judicially cognizable standards. Here, the Department's consular venue rulemaking authority is cabined by consistent Department practices, specifically endorsed by Congress, that establish objective criteria against which to judge consular venue policies.

In any event, whether or not respondents' challenges under the INA and APA are subject to judicial review, there can be no doubt that the federal courts may consider Mr. Vo's constitutional challenge.

ARGUMENT

I. THE STATE DEPARTMENT'S POLICY VIOLATES THE STATUTORY PROHIBITION AGAINST DISCRIMINATION IN THE ISSUANCE OF IMMIGRANT VISAS.

By requiring Vietnamese residents of Hong Kong to return to Vietnam before they can apply for and be issued an immigrant visa, while allowing Hong Kong residents of every other nationality to have their visas processed and issued in Hong Kong, the Department's policy plainly discriminates against Vietnamese nationals in violation of Section 1152(a)(1) of the INA, which provides that, with the exception of certain specifically delineated circumstances (none of which apply here):

> no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, *nationality*, place of birth, or place of residence.

8 U.S.C. § 1152(a)(1) (emphasis added). Enacted as part of the Immigration and Nationality Act Amendments of 1965, Pub. L. 89-236, § 1152(a)(1) "manifested Congressional recognition that the maturing attitudes of our nation made discrimination on [the enumerated] bases improper." *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 453 (S.D. Fla. 1980).

Before this Court, the Department contends that its policy does not discriminate on the basis of "nationality," and does not discriminate in the "issuance of immigrant visas." Reduced to its essence, the Department's position is that it is free to ignore an unambiguous congressional prohibition on the basis of vague and unsupported foreign policy "concerns."

A. The Department's Policy Discriminates Against Vietnamese Visa Applicants Because Of Their Nationality.

The Department requires Vietnamese residents of Hong Kong to return to Vietnam in order to apply for and obtain their immigrant visas, but allows Hong Kong residents of every other nationality to apply for and obtain immigrant visas in Hong Kong. If an Australian man who entered Hong Kong illegally is the beneficiary of an IV petition, he may simply walk into the U.S. Consulate in Hong Kong, which will process and issue his visa,

and be promptly reunified with his wife or children living in the United States. If, however, a Vietnamese man who entered Hong Kong illegally is the beneficiary of an IV petition, and walks into the Consulate in Hong Kong, he is turned away and told he must return to the county from which he fled. Reunification with his family will be substantially delayed, if not forever thwarted.

The D.C. Circuit correctly found, based on the Department's own statements, that this policy is discriminatory because it draws "an explicit distinction between Vietnamese nationals and nationals of other countries": the Department instructed the U.S. Consulate in Hong Kong not to process the "immigrant visa [applications] of *Vietnamese nationals* residing illegally in Hong Kong." Pet. at 9a, 12a; JA 112-13; JA 208-09. As the Department's operating manual makes clear, nationals of other countries who reside in Hong Kong can be processed and issued IVs, regardless of whether their status in Hong Kong is legal or illegal. Foreign Affairs Manual ("FAM") § 42.61, N.1.2 ("the fact that an alien does/did not have, or intend to have, the status of a lawful permanent resident or any other legal status" in the country of his principal, actual dwelling "is not relevant"), *reprinted in*, 10 Charles Gordon & Stanley Mailman, *IMMIGRATION LAW & PROCEDURE* (1996) (hereinafter cited as FAM § 42.61). Thus, in requiring that Vietnamese residents of Hong Kong establish the legality of their status (*i.e.*, that they are screened-in) to have their visas processed in Hong Kong, the Department's policy unquestionably "discriminate[s] against Vietnamese on the basis of their nationality." Pet. at 11a.

The Department asserts that its policy, which was formulated specifically to deal with Vietnamese boat people, is not discriminatory because the line it draws between Vietnamese nationals and other nationals is based upon the "screened-out" status, rather than the "illegal" status, of the Vietnamese nationals. The Department mischaracterizes its own policy. As the Department informed the HKG, its non-processing policy applies to any Vietnamese national who has not been screened-in, whether because they are "awaiting a screening decision" or have been "screened-out" as a non-refugee. JA 74-75; JA 78-79. The HKG treats all Vietnamese nationals in Hong Kong without proper travel documents as illegal aliens and detains them, unless they are

screened-in as political refugees. The Department's policy, therefore, applies to all Vietnamese nationals illegally in Hong Kong. JA 50-53; JA 69.

Moreover, even if one assumes, counterfactually, that the Department's characterization is correct, its policy nonetheless discriminates on the basis of nationality. As the Department acknowledges in its brief (at 46), its policy applies to Vietnamese nationals who are denied refugee status, but not to the nationals of other states who are denied such status. Thus, the Department's policy is discriminatory because it draws an explicit distinction between Vietnamese nationals denied refugee status, who are required to return to their country of origin for visa processing and issuance, and applicants of all other nationalities denied refugee status, who can have their visas processed in the country in which they reside.[5] Were such a policy applied to deny processing to blacks or women who had been denied refugee status, no one would question that such a policy was discriminatory on its face. The result can be no different where the basis for distinction lies in the applicant's nationality, rather than in his or her race or sex.

The Department also asserts that its policy is neutral as to nationality because it only applies to asylum-seekers who are screened-out under an international plan (*i.e.*, the CPA). According to the Department, its policy does not treat similarly situated nationals differently, but merely has a disparate impact on Vietnamese nationals because they happen to be the only nationals who are subject to the plan.[6] As the Department admits, however,

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[5] The Department asserts that the fact that it also requires screened-out Laotian nationals who reside in Thailand to return to Laos to apply for IVs somehow renders its policy with respect to Vietnamese residents of Hong Kong non-discriminatory. None of the evidence the Department cites for the proposition that its policy applies equally to Laotian nationals is part of the record in this case, and thus it should be disregarded. *See* Pet. 12a. Even if true, however, as the district court stated in a related case, the fact that the Department's policy might also apply to Laotian nationals proves nothing more than that "the Department of State maintains a policy that discriminates against asylum-seekers from not one, but two or three specific countries." *Vo Van Chau*, 891 F. Supp. at 655.

[6] Respondents acknowledge that § 1152(a)(1) was not intended to prohibit disparate impact discrimination. Accordingly, the Department's argument that it

the CPA itself is not neutral as to nationality, but rather is "tailored to address a very specific problem involving migration of nationals primarily of one country," Vietnam. Pet. Br. at 47. Whether or not the Department's description of its classification explicitly mentions Vietnamese nationals, the CPA—to which the Department's policy refers and upon which it is based—itself draws an explicit distinction between Vietnamese and persons of other nationalities. In any event, the Department's CPA-related justification for its policy is pretextual. The Department itself acknowledged in 1990, and the record before this Court demonstrates, that the CPA does not preclude the processing and issuance in Hong Kong of IVs for screened-out Vietnamese. JA 115-16; JA 72-73.

At bottom, the Department's position is that its policy of requiring Vietnamese nationals to return to their country of origin for visa processing is non-discriminatory, even though it draws a nationality-based distinction, because it was adopted to serve perceived foreign policy goals that apply only to Vietnamese. Thus, the Department says, no other nationalities are similarly situated. The critical flaw in the Department's argument is that it confuses a discriminatory classification with the purported justification for that classification.

In advancing a theory of discrimination that defines the existence of a classification by reference to its justification, the Department would have this Court reverse more than a half century of its equal protection jurisprudence dating at least as far back as the classic cases of *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944). In each of those cases, the government argued that its policies imposing severe restrictions on persons of Japanese ancestry were justified by the need to prevent "espionage and sabotage, in time

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is impossible to "fashion a standard to determine" whether, for instance, a decision to operate fewer consulates in one country as opposed to another constitutes discrimination is beside the point. However ill-equipped the courts might be to make such a determination, they are surely competent to determine the legality of an agency policy that on its face discriminates against a statutorily protected class.

of war and of threatened invasion." *Hirabayashi*, 320 U.S. at 100. Although the Court ultimately upheld the policies at issue as justified by a compelling national interest, the Court nevertheless regarded the national origin classification as "inherently suspect" and thus subjected it to strict judicial scrutiny. *Korematsu*, 323 U.S. at 216. Under the Department's novel theory of discrimination, however, the restrictions imposed on natives of Japan should not have even presented a discrimination issue because natives of no other country were similarly situated—only Japan had invaded American soil.

The Department cannot be correct in theorizing that discrimination based upon nationality (or upon race) does not occur whenever there are relevant differences (e.g., coverage under an international plan) that separate nationals of one country (or members of one race) from nationals of other countries (or members of other races). Differences can always be identified between any two classes of individuals and, in certain instances, those differences may even justify differing treatment. In § 1152(a)(1) of the INA, however, Congress has ordained that with respect to the issuance of an IV, no distinctions may be drawn between groups of persons *because* of their race, nationality and sex—regardless of whether the group so classified differs from others in some additional identifiable manner. In other words, when it comes to the issuance of an IV "so far as the [Congress] is concerned, people of different races[, nationalities and gender] are always similarly situated." *M. v. Superior Court of Sonoma County*, 450 U.S. 464, 478 (1981) (Stewart, J., concurring).

B. The Department's Policy Discriminates Against Vietnamese Visa Applicants In The Issuance of Immigrant Visas.

For the first time in its petition for rehearing to the court of appeals, the Department asserted that its policy does not discriminate in the "issuance" of a visa, but merely in the way in which the visa application is "processed."[7] The Department

[7] By not making this argument until its petition for rehearing, the Department has waived it. In fact, when it addressed respondents' § 1152(a)(1) claims in both courts below, the Department did not dispute that its policy

contends (at 41) that because § 1152(a)(1) uses the word "issuance," the statute only prohibits discrimination by a consular officer "when deciding whether to grant or deny [a specific] immigrant visa" and does not prohibit discrimination of any kind with respect to "other aspects of the visa application process."

The arbitrary line the Department seeks to draw between discrimination in the "decision" of a consular officer whether to grant or refuse a visa and discrimination at all other stages of the visa application process finds no support in the statutory text, structure or purpose. Nothing in the language of § 1152(a)(1) suggests that it was intended to limit only the authority of consular officers in deciding whether to grant or deny individual visas. Section 1152(a)(1) does not read that "no person shall be discriminated against by a consular officer in the decision whether to grant or refuse an immigrant visa." Rather, § 1152(a)(1) is a general prohibition, which provides that "[n]o person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's . . . nationality," whether the source of such discrimination is an individual consular officer, the Secretary of State or the Attorney General.

Had Congress intended to limit § 1152(a)(1)'s prohibition on discrimination only to the penultimate aspect of the visa issuance process, *i.e.*, the substantive decision of a consular officer whether to grant or deny a specific visa, it certainly knew how to do so. For example, in delineating the powers and duties of the Secretary of State with respect to the immigration and nationality laws in § 1104(a) of the Act, the Congress specifically excluded "those powers, duties and functions relating to *the granting or refusal of visas*." The fact that the Congress did not use similar language in § 1152(a)(1) of the Act is a powerful indication that it did not

constituted discrimination on the basis of nationality in the "issuance of an immigrant visa." Moreover, because the Department did not come up with the "issuance" argument until so late in the day neither the district court nor the court of appeals had the opportunity to consider it. As a prudential matter, this Court should not be the first court in the country to do so.

intend to limit the prohibition on discrimination to the consular officer's substantive decision whether to grant or refuse a visa.[8]

Similarly, there is no etymological basis for the Department's definition of the word "issuance" that would restrict its meaning to the consular officer's "decision." The dictionary cited by the Department defines "issuance" to mean "officially putting forth . . . or making available or distributing or giving out or granting (as licenses) or proclaiming or promulgating (as a written order or directive)." Pet. Br. at 43 n.32. As this dictionary definition makes clear, the meaning of the word "issuance" is not "the decision" whether to grant or deny a license, but is (and at a minimum includes) the actual putting forth or giving out of the license. *See, e.g., Florida Manufactured Housing Ass'n v. Cisneros*, 53 F.3d 1565, 1574 (11th Cir. 1995) (agency attempt to redefine the word "issued" to mean "the act of arriving at a private decision within the agency," rather than the actual announcement of the decision, "contravenes the plain meaning of the term"). Even the Department recognizes (at 41) that when Congress prohibited discrimination in the issuance of an immigrant visa, it could not possibly have intended to permit discrimination in all aspects of the visa application process prior to the point at which a consular officer actually furnishes the visa document to the applicant. There is no basis in the definition to conclude, as the Department does, that Congress intended to permit race and nationality discrimination at every stage of the visa issuance process except the penultimate stage at which a consular officer "privately" decides whether to grant or deny a visa.[9]

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[8] The Department's interpretation of "issuance" to mean the decision whether to grant or refuse also cannot be reconciled with the fact that in addition to prohibiting discrimination, § 1152(a)(1) provides that "[n]o person shall receive any . . . priority . . . in the issuance of an immigrant visa" on any of the specified grounds. The use of the word "priority" strongly suggests that § 1152(a)(1) is concerned not merely with the substantive decisions affecting visa issuance, but also with the *timing* of such issuance—a matter that is inextricably related to place of processing.

[9] The use of the word "issuance" in numerous other sections of the INA confirms the word's meaning as the actual "putting forth" or "giving out" of a visa, order, permit or other official document, rather than a Department official's private decision prior to the "issuance." *See, e.g.*, 8 U.S.C. §§ 1105(a)(1), 1105a(a)(8), 1153(g), 1203(b), 1203(c), 1227(a)(1), 1322(a), 1421(b)(4).

Ultimately, however, parsing all the various phrases in the rather extensive dictionary definition of the word "issuance" is beside the point. In trying to focus the discussion on the meaning of the word "issuance," the Department seeks to obscure the basic fact that § 1152(a)(1) bars the Department from *discriminating* against certain protected classes of individuals in the issuance of immigrant visas.[10] When Congress prohibited all discrimination in the issuance of an immigrant visa, it necessarily prohibited the Department from imposing onerous procedural requirements on the issuance of an immigrant visa, which make the procurement of such visas impossible or significantly more difficult for members of a particular race or nationality.[11] There can be no doubt that a policy that requires undocumented black, female or Vietnamese residents of Hong Kong to travel to Timbuktu before they can apply for and be issued immigrant visas—while allowing all other undocumented residents of Hong Kong to apply for and be issued immigrant visas at the U.S. Consulate in Hong Kong—constitutes "discrimination" in the issuance of an immigrant visa on account of race, sex or nationality. Whether the word "issuance" is defined as "putting forth," "making available," "distributing," "giving out" or "granting," the Department's policy of requiring

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[10] A leading dictionary defines "discrimination" to mean "the according of differential treatment to persons of an alien race or religion (as by formal or informal restrictions imposed in regard to housing, employment or use of public common facilities)." *Webster's Third New International Dictionary* 648 (def. 4(a)) (1971). Applying this common usage definition of discrimination to § 1152(a)(1), that Section prohibits "the according of differential treatment to persons of [a particular] race or [nationality] (as by formal or informal restrictions imposed in regard to [the issuance of an immigrant visa])."

[11] *Cf. Lane v. Wilson*, 307 U.S. 268, 275 (1939) (Fifteenth Amendment "hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race"). The Department's unsupported assertion that its policy has no "discriminatory effect on the 'issuance of immigrant visas'" is simply wrong. As the record in this case makes clear, forcing a Vietnamese national to make his application in Vietnam will delay the issuance of the visa by at least a year and may even result in its denial. JA 137-38; JA 143-46; JA 157; *Vo Van Chau*, 891 F. Supp. at 656.

Vietnamese nationals to return to Vietnam to have their visas processed and issued violates § 1152(a)(1).

The INA itself recognizes that the "issuance" of visas cannot be separated from the procedures under which visa applications are processed. Section 1201 of the Act, entitled "Issuance of visas," for example, provides that a visa shall not be "issued" to an alien if the "application fails to comply with the provisions of this chapter [the INA], or the regulations promulgated thereunder." 8 U.S.C. § 1201(g). This provision—as well as § 1202(a) relating to place of processing, on which the Department places great reliance in its Brief (at 16-17, 36-39)—is included under a subchapter entitled "*Issuance* of Entry Documents" (emphasis added). *See also* H.R. Rep. No. 1365, 82d Cong., 2d Sess. 53 (1952) ("Sections 221, 222, and 223 provide for the issuance of entry documents . . . [including] both immigrant and nonimmigrant visas."). Clearly, Congress understood that the "issuance" of a visa is the result of, and cannot be separated from, the process by which the visa is obtained.[12]

It is this Court's "task . . . to interpret the words of [this] statute[] in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). The principal purpose of the 1965 Amendments to the INA was to repeal the discriminatory national origins quota system and to ensure that "henceforth there will be no differentiation in the treatment of the Asian" under the INA. S. Rep. No. 748, 89th Cong., 1st Sess. 10, 15 (1965). In eliminating discrimination from the system, Congress specifically "anticipated that all individuals

[12] The Department asserts (at 45) that the court of appeals erred in failing to defer, under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), to its "reasonable construction" of the term "issuance." The Department is disingenuous in faulting the court of appeals for failing to defer to an interpretation that was asserted for the first time in its petition for rehearing. The Department's litigation position, a *post hoc* rationalization by appellate counsel, is entitled to no deference. *See, e.g., Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991). Moreover, there is nothing ambiguous about the language of § 1152(a)(1). And even if there were, the Department cannot contend its interpretation of the word "issuance" is reasonable where its arguments about the meaning of the statute are inconsistent with each other. *See* pp. 23-24, *infra*.

from each foreign state will be able to participate equally and fairly in the numbers . . . made available for immigration." H.R. Rep. No. 745, 89th Cong., 1st Sess. 13 (1965). The distinction the Department asks this Court to draw between processing and issuance is an artificial one that would undermine the congressional purpose in barring nationality and race discrimination in the issuance of immigrant visas, because a visa cannot be issued to anyone who has not gone through the process.[13]

The Department's interpretation of § 1152(a)(1) would render the provision meaningless. As the Department takes much pain to point out, decisions by consular officers to grant or deny visas to specific individuals historically have been immune from judicial review even at the request of U.S. citizens under the doctrine of "consular non-reviewability." Pet. Br. at 16-17, 36-39. Such decisions are not even reviewable by the Secretary. 8 U.S.C. § 1104(a). If the Department's interpretation is correct, § 1152(a)(1) would be entirely precatory—it would not apply to any action by State Department or INS officials other than the final decisions of consular officers, and discrimination by consular officers in decisions to grant or deny visas would not be remediable as a result of § 1104(a) and the consular nonreviewability doctrine. Such an interpretation would certainly defy "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *accord Atchison, T. & S. F. R. Co. v. Buell*, 480 U.S. 557, 562 (1987).

The Department's argument ignores logic and common sense. Under the Department's interpretation, the Secretary of State would be free to suspend indefinitely all processing of IVs for a

[13] The fact that the Department was able to slip into the immigration bill, currently pending before a House-Senate Conference Committee, an amendment that would reverse the court of appeals' interpretation of § 1152(a)(1) says nothing about Congress' intent when it enacted that section in 1965. Nor does it say anything about Congress' current view. Having "recently become aware" of this "obscure" provision, 45 congressmen, including 13 members of the House Judiciary Committee, sent a letter to the President on August 1, 1996 (lodged with the Clerk of this Court), expressing their view that the court of appeals' interpretation of § 1152(a)(1) was correct and asking the Administration to withdraw its support for the proposed amendment.

group of aliens purely on the basis of race or nationality, since that suspension would not involve individual consular officers' decisions whether to grant or deny a particular visa application. Similarly, under the Department's view, the statute would not bar INS officials from adopting a policy of refusing to process family reunification immigration petitions for Asians or Africans, while processing them for Europeans. It is inconceivable that this was the intent of Congress when it enacted 8 U.S.C. § 1152(a)(1).

C. The INA Does Not Exempt Consular Venue Policies From The Anti-Discrimination Mandate In § 1152(a)(1).

No provision in the INA exempts "consular venue" policies from the requirement of § 1152(a)(1). Contrary to the Department's argument, the absence of a separate provision precluding discrimination on the basis of race and nationality in § 1202(a)—which provides that aliens applying for an immigrant visa shall do so "in such form and manner and at such place as shall by regulations be prescribed"—lends no support to its position. Having imposed a general prohibition prohibiting discrimination in the issuance of an immigrant visa in § 1152(a)(1), Congress could not have been expected to include a separate non-discrimination provision in each individual section of the INA that addresses some specific aspect of the visa issuance process.

To the contrary, had Congress intended to limit the reach of § 1152(a)(1) to the specific visa decisions of consular officers, it should, by the Department's logic, have placed that non-discrimination provision in § 1201 of the Act which addresses the authority (and the limitations on the authority) of consular officers to issue an IV. If anything, Congress' placement of the provision in a section of the Act that has nothing to do with the authority of consular officers is further evidence that the non-discrimination provision is not directed purely at the decisions of consular officers.

The Department also contends (at 43) that had Congress intended § 1152(a)(1) to be a general bar against race, sex and nationality discrimination, it would have placed such a bar "as a general provision of the INA." The Department, however, does

not state in which "general provision" of the INA one might expect Congress to have placed the discrimination prohibition. This is not surprising. The INA does not contain any such general provisions.

The fact that Congress placed the non-discrimination provision in the section governing numerical limitations on the admission of immigrants from individual states should also come as no surprise, since it is in that section that Congress replaced the discriminatory national origins quota system with "a new system for issuance of immigrant visas without regard to national origin." S. Rep. No. 748 at 21. It makes perfect sense that Congress would include in the same section that created this neutral system, a provision prohibiting discrimination in the issuance of IVs on the basis of race, sex, nationality and national origin.

Despite the logic of including § 1152(a)(1) in the "section of the INA that addresses numerical limitations" on admission, the Department argues (at 43-44) that this placement establishes that the prohibition on discrimination applies only to "the allocation of immigrant visas." This argument is entirely inconsistent with the plain language of § 1152(a)(1), which prohibits discrimination in the "issuance of an immigrant visa," not in the "allocation of immigrant visas." Furthermore, the Department's tortured construction would render the prohibition on discrimination in § 1152(a)(1) superfluous. The system established by Congress in the 1965 Amendments leaves neither the Secretary nor individual consular officers with any discretion over the allocation of IVs. Rather, "subject to specified limitations designed to prevent an unreasonable allocation of visa numbers to any one foreign state," the Act requires that the Secretary make IVs available "on a first-come, first-served principle, without regard to place of birth." S. Rep. No. 748 at 14; *see* 8 U.S.C. § 1153(e)(1) ("[i]mmigrant visas . . . shall be issued to eligible immigrants in the order in which a petition on behalf of each immigrant is filed"). Congress thus left no room for the Secretary or consular officers to make any determinations in respect of the allocation of IVs, much less any room to discriminate in such allocation on the basis of race, nationality or sex. Accordingly, to interpret 8 U.S.C. § 1152(a)(1) as barring discrimination only in respect to the allocation of IVs is to read that anti-discrimination provision out of the INA. It is,

however, a fundamental rule of statutory construction that statutes be construed, if possible, to give all of their provisions meaning and "operative effect." *United States v. Nordic Village*, 503 U.S. 30, 36 (1992).

The Department's position that § 1152(a)(1) applies only to the allocation of visas is completely at odds with its other statutory argument: that § 1152(a)(1) applies only to the decisions of consular officers. If "issuance" means only the decisions of consular officers, it cannot be that § 1152(a)(1) goes only to IV allocations because consular officers make no decisions regarding allocation. For the same reason, if § 1152(a)(1) goes only to IV allocations, "issuance" cannot mean the decisions, of a consular officer. Obviously, the Department is straining mightily to overcome the plain language of the statute.

The Department falls back on the assertion (at 42) that a "construction of Section 1152(a)(1) as extending to consular venue determinations . . . would be unworkable" because that section precludes discrimination on the basis of an alien's place of residence and the State Department has historically required "aliens to apply for visas in their place of residence." Such a requirement, however, does not discriminate against aliens on the basis of their residence anymore than would a requirement that all aliens apply for visas in their country of origin discriminates against aliens on the basis of their nationality. In both instances, the consular venue requirement applies across the board to all aliens, regardless of their country of residence or their nationality.[14] A requirement directing that an alien apply for a visa in his country of residence or nationality would be discriminatory only if it were restricted to aliens who reside in a particular place or are nationals of a particular country—precisely the situation in this case.

Unable to support its argument by reference to the statutory text, structure or purpose, the Department resorts to a policy appeal, warning that if its interpretation is rejected, the United

[14] For the same reason, the Department's requirement that all aliens who are nationals of a country in which no consular office is located apply for an IV in another country is also non-discriminatory. *See* note 31 *infra*.

States will be deprived of "an effective tool in deterring mass migration." Pet. Br. at 48. Other than this case, however, the Department can cite no instance in which it has ever needed to use this "tool." This is not surprising because IV beneficiaries are only likely to take part in a "mass migration" in the rare instance when their government interferes with their ability to obtain an IV at a U.S. consulate located where they reside. Even when this occurs, the Department's assertion that it will lose an "effective tool" is still incredible because the number of U.S. IV beneficiaries will inevitably be just a tiny fraction of any mass migration.

The Department protests that "[n]ationality distinctions have long played a significant and legitimate role in the application of our immigration laws." As Congress recognized when it passed the 1965 Amendments to the INA, however, it is also the case that distinctions based on "race and place of birth" have played a significant and shameful role in the "selection of immigrants" under our immigration law. H.R. Rep. No. 745 at 10. Whatever role such distinctions may have played in the past, in enacting § 1152(a)(1), Congress placed classifications based on nationality on the same footing as classifications based on race, gender and country of birth and prohibited the Secretary from discriminating on all such grounds in the issuance of immigrant visas.

II. THE STATE DEPARTMENT'S POLICY VIOLATES MR. VO'S CONSTITUTIONAL RIGHT TO NON-DISCRIMINATORY TREATMENT.

Both in enacting the INA in 1952 and in amending it in 1965, "Congress extended to American citizens the right to choose to be reunited in the United States with their immediate families." *Fiallo v. Bell*, 430 U.S. 787, 806 (1977) (Marshall, J., dissenting). Under the system established by Congress, every American citizen has "the right to bring his alien spouse[,] . . . his alien minor child [and, in the case of an American citizen over the age of 21, his parents] as nonquota immigrant[s]." H.R. Rep. No. 1365, 82d Cong., 2d Sess. 29 (1952); *see* 8 U.S.C. § 1151(b). An American citizen also has the right to bring his adult children and siblings as quota immigrants. 8 U.S.C. § 1153. Each of these provisions "implement[] the underlying intention of our immigration laws

regarding the preservation of the family unit." H.R. Rep. No. 1365 at 29; *accord* S. Rep. No. 748 at 12.

Though classifications based on race, sex, and nationality once characterized our immigration laws, Congress eliminated race and sex as a bar to immigration when it passed the 1952 Act (H.R. Rep. No. 1365 at 28) and, as we have seen, eliminated nationality as a bar when it passed the 1965 Act. Expressing its indignation with a system that had unjustly separated thousands of American citizens from their families, Congress removed these discriminatory barriers to ensure that "American citizens be accorded equal consideration in bringing their loved ones here." 111 Cong. Rec. 21,767 (1965) (remarks of Mr. Minish).[15]

The Department's discriminatory implementation of this congressionally mandated family reunification program violates the constitutional right of American citizens to equal protection. We do not contest the settled principle that "an alien seeking initial admission to the United States . . . has no constitutional right[]" to immigrate to this country. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). This case, however, "unlike most immigration cases that come before the Court, directly involves the rights of citizens, not aliens." *Fiallo*, 430 U.S. at 806 (Marshall, J. dissenting). Where, as here, Congress establishes a program, "fair on its face and impartial in appearance," that confers a right upon the citizenry of this country, agency officials are without authority to apply that program with "an unequal hand" against a traditionally suspect group. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).[16] When agency officials exceed this authority, they deny to the members of the group so targeted the right to equal protection of the laws and violate the Fifth Amendment.

[15] *See also* 111 Cong. Rec. 21,759 (1965) (the bill "will destroy such discrimination" that denies Americans "the right to be with their loved ones") (remarks of Rep. Barrett); *id.* at 21,594 (Because of "its discrimination and inflexibility" the national origins quota system is "an injustice to thousands of citizens and residents separated from their loved ones") (remarks of Rep. Rodino); *id.* at 21,788 (the bill will "bring our immigration law . . . into compatibility with the philosophy that has made and that is America—equal opportunity for all U.S. citizens.") (remarks of Rep. Sickles); *id.* at 21,765-66 ("purpose" of bill is to "correct the injustices suffered by thousands of our citizens" who have been separated from "loved ones who have been left in foreign lands") (remarks of Rep. Adams).

A. The Department's Policy Discriminates Against A Class Of American Citizens On A Constitutionally Suspect Basis.

This Court has long regarded "classifications based on . . . nationality," like those based on race, as "inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *accord Miller v. Johnson*, 115 S. Ct. 2475, 2486 (1995); *Korematsu*, 323 U.S. at 216; *Hirabayashi*, 320 U.S. at 100. In singling out Vietnamese visa beneficiaries for discriminatory treatment, the Department's policy necessarily discriminates against their American citizen sponsors, who will almost invariably have the same national origin as the family member on behalf of whom he or she has filed an IV petition. In the context of a family reunification program, therefore, discrimination against non-resident aliens on the basis of national origin necessarily constitutes discrimination against sponsoring American citizens on the basis of their own national origin.

Of equal importance, this Court has long recognized that classifications that distinguish among American citizens on the basis of the race or national origin of their family members are themselves constitutionally suspect. In *Oyama v. California*, 332 U.S. 633 (1948), for instance, this Court subjected to heightened judicial scrutiny a law that restricted the ability of Japanese aliens to convey property to their American children because it discriminated against the children "based solely on [their] parents' country of origin"—"as between the citizen children of a Chinese or English father and the citizen children of a Japanese father, there is discrimination." *Id.* at 640, 645. Similarly, in *Palmore v. Sidoti*, 466 U.S. 429 (1984), this Court held that the Equal

[16] The Department incorrectly asserts (at 32) that "no claim of a violation of the constitutional rights of United States citizens was before the court of appeals. In fact, respondents extensively briefed their constitutional challenge in the court of appeals and in the district court. *See* Appellants' Brief at 34-37; Appellants' Reply Brief at 8-10; Plaintiffs' Summary Judgment Mem. at 23-27.

Protection Clause required that the "the most exacting scrutiny" be applied to a classification that denied custody to the parent of a child based on the race of his or her spouse. *Id.* at 432; *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) ("decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination").

The application of heightened scrutiny is particularly appropriate in this case in view of the fact that the statutory right with which the Department's discriminatory policy interferes—the right to family unity—is itself a central part of "the liberty protected by the Due Process Clause." *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632, 639 (1974). This Court has recognized that "the right to rejoin [one's] immediate family [is] a right that ranks high among the interests of the individual." *Landon*, 459 U.S. at 34; *accord Moore v. East Cleveland*, 431 U.S. 494, 503 (1977). In noting that the interest in family reunification is one of constitutional dimension, we do not mean to suggest that Congress is not free to make whatever policy choices it deems appropriate in determining the criteria for admission of aliens. Where, however, Congress has enacted a statute to enable American citizens to realize the enjoyment of a fundamental right, this Court should closely scrutinize the policies of public officials who seek to restrict it. And where, as here, those policies not only restrict such rights but do so in a manner that discriminates against a suspect class, they should be deemed "presumptively invalid" and upheld only upon the showing of the most "extraordinary justification." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

B. Absent A Specific Delegation Of Congressional Authority, State Department Officials May Not Discriminate Against American Citizens In Immigration Matters On Constitutionally Suspect Grounds.

Were the statutory rights at issue in this case to touch upon any matter other than immigration, there would be no doubt that the administration of those rights in a manner that discriminates on the basis of race, gender or national origin would be subject to the most exacting judicial scrutiny. The critical issue in this case, therefore, is whether, in the absence of a specific delegation of

congressional authority, State Department officials have the constitutional authority to make classifications based upon race, gender and national origin in matters concerning immigration that would be plainly unconstitutional if made in any other context. We submit that the answer is no.

1. The authority to discriminate against American citizens in matters of immigration lies solely with Congress.

Respondents do not challenge any congressional policy choice concerning which classes of aliens may be admitted to this country and the conditions under which they may gain such admission. Rather, respondents challenge a policy choice made by State Department officials to discriminate against a class of U.S. citizens on the grounds of their own national origin and that of their family members, in contravention of an expressed congressional intention to remove all barriers to admission based on that ground.

This distinction between congressional and administrative action is critical. This Court has long recognized the authority of "*Congress* [to] make[] rules [for aliens] that would be unacceptable if applied to citizens," *Mathews v. Diaz*, 426 U.S. 67, 80 (1976). While the Department spills much ink in its effort to characterize the power over the admission of aliens as belonging equally to the Executive and the Legislative branches, it cites no case in support of that proposition. That is because the Department's proposition is wrong. The principle that:

> the formulation of [immigration] policies is *entrusted exclusively to Congress* [is] as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.

Galvan v. Press, 347 U.S. 522, 531 (1954) (emphasis added); *accord Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) ("[t]he Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens'"); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) ("over no conceivable subject is *the legislative power of Congress* more complete than it is over" the admission of aliens) (emphasis added).

Far from having co-equal power over immigration matters, the authority of the Executive in this area is subservient to that of Congress. It is the "responsibility of the Executive Branch faithfully to execute the immigration policy adopted by Congress." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982). In carrying out its role "[i]n the enforcement of [congressional] policies, the Executive Branch of the Government must respect the procedural safeguards" fixed by Congress. *Galvan*, 347 U.S. at 531; *accord Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (R. B. Ginsburg, J.) (Executive discretion in area of immigration "extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations."), *aff'd by an equally divided court*, 484 U.S. 1 (1987).

From these principles, it follows *a fortiori* that any authority to make classifications in respect of the admission of aliens that would be constitutionally suspect if made outside the realm of immigration lies solely in Congress. This Court recognized as much just three months before the enactment of the INA in 1952:

> the conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether [and] the basis for determining such classification ... have been recognized as matters *solely for the responsibility of the Congress*.

Harisiades v. Shaughnessy, 342 U.S. 580, 596-97 (1952) (emphasis added); *Boutilier v. I.N.S.*, 387 U.S. 118, 123 (1967) (same). Had Congress made the classification that has been drawn in this case, that classification would not be subject to strict judicial scrutiny for the sole reason that Congress has plenary authority in the admission of aliens. Unlike Congress, however, the Secretary of State—much less the lower officials in the Department who promulgated this policy[17]—may not invoke the mantle of plenary power as a means of shielding his discriminatory conduct from such scrutiny. *See Jean v. Nelson*, 472 U.S. 846, 857 (1985).

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[17] The only indication in the record of the level at which the policy was promulgated comes from an October 1994 cable reinstituting the April 1993 policy, in which the highest official listed is Michael Hancock, Managing Director of the Department's Visa Office. JA 217.

This principle is confirmed by this Court's decision in *Fiallo v. Bell*. Citing the "exceptionally broad power" of Congress "to determine which classes of aliens may lawfully enter the country," the Court held that a provision of the immigration law that denied fathers of illegitimate children and children of illegitimate fathers preferential immigration status was not subject to heightened scrutiny under the Constitution. 430 U.S. at 794. In dissent, Justice Marshall argued that having extended certain rights of family reunification to American citizens, Congress could not, in the absence of an important government interest, "deny those rights to a class of citizens traditionally subject to discrimination." 430 U.S. at 808. Addressing Justice Marshall's argument, the majority agreed that it "would be persuasive if [the dissent's] basic premise," that "the Act grant[s] a 'fundamental right' to American citizens," were accepted. 430 U.S. at 795 n.6. In that case, however, the dissent's premise was wrong, because while Congress had granted a fundamental right to most U.S. citizens, it had made a "policy choice" to deny that right to illegitimate children and their fathers. *Id.* at 795.

In contrast, this case involves a policy choice not by Congress in the exercise of its plenary immigration power, but by State Department officials to discriminate against American citizens in respect of a fundamental right—the right to reunite with their immediate family—that Congress has specifically conferred on them. Thus, this case involves precisely the situation in which the *Fiallo* majority agreed that Justice Marshall's dissent would have been persuasive.

2. Congress has not delegated to State Department officials the authority to discriminate in the administration of the family reunification program.

Absent a specific delegation of congressional authority or the presence of a compelling state interest, State Department officials cannot discriminate against a traditionally suspect class of American citizens in their enjoyment of this statutory right without violating the Fifth Amendment. Congress has made no such delegation.

Both this Court and the Attorney General have acknowledged that when a provision of the INA vesting discretion in agency

officials is neutral on its face, such a provision cannot be interpreted as authorizing discrimination on grounds of nationality. In *Jean v. Nelson*, a class of Haitian nationals brought suit challenging the authority of INS officials to discriminate against them on the basis of their national origin in making parole decisions under 8 U.S.C. § 1182(d)(5)(A). While characterizing the grant of discretion under that provision as "exceedingly broad," the Attorney General conceded—and this Court ruled—that "the INS's parole discretion under the statute and regulations does not extend to considerations of race or national origin." 472 U.S. at 855.

If Congress did not grant INS officials authority to base parole decisions on considerations of national origin when it drafted the broad discretionary language contained in the parole statute, it simply cannot be that Congress granted State Department officials authority to discriminate on the basis of national origin in the administration of the INA's family reunification program. That family reunification program, unlike the parole program, grants American citizens a statutory right to reunite with their immediate relatives in this country without regard to race, nationality or gender. The proposition that such a delegation exists is further refuted by the anti-discrimination prohibition in § 1152(a)(1).

Where, as here, an intent to delegate specific authority is not clear from the plain language of the statute, this Court has demonstrated a profound "hesita[nce] to impute" a congressional purpose to authorize agency action that could not withstand constitutional scrutiny absent the congressional delegation. *Kent v. Dulles*, 357 U.S. 116, 128 (1958). In *Kent* the Court considered whether the Secretary of State had acted within his authority under the INA in denying a passport to an American citizen on the basis of his affiliation with the Communist Party. Like the "consular venue" provision at issue here, the provision imbuing the Secretary with power over the issuance of passports in *Kent* was "expressed in broad terms." *Id.* at 127. Nonetheless, the Court held that absent a specific provision restricting the issuance of a passport on account of a person's beliefs or associations, the Secretary had no authority to "employ that standard to restrict the citizens' right of free movement." *Id.* at 130. The Court was guided by the principle that where "an exercise by an American

citizen of an activity included in constitutional protection" is involved, it will "construe narrowly all delegated powers" and will "not readily infer that Congress gave the Secretary of State unbridled discretion" to act as he pleases. *Id.; see also United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210, 219 (1949).

As in *Kent*, this case involves a right entitled to Fifth Amendment protection—the right to participate on an equal basis in a congressionally mandated family reunification program. The Department asserts that § 1202(a), a grant of rulemaking authority expressed in broad terms, was enacted to give the Department limitless and unreviewable discretion to make consular venue decisions for its own benefit.[18] *Kent* teaches, however, that the "key to the problem . . . is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he has discretion." 357 U.S. at 125. In *Kent*, the Court emphasized that "while the power of the Secretary . . . is expressed in broad terms, it was apparently long exercised quite narrowly." *Id.* at 127. In this case, at the time the INA was enacted in 1952, the Department's regulations, consistent with its longstanding practice, provided for IV processing in the consular office located "in the district of a foreign country in which the alien has his domicile," but gave an applicant the option to apply for a visa outside his country of residence if certain specifically enumerated criteria were met. 59 Fed. Reg. 39,953 (1994) (quoting pre-1952 regulation).

The legislative history of § 1202(a) reveals that Congress expected the Secretary to enact a more "flexible requirement" patterned after the "[e]xisting regulations," so as to effectuate Congress' principal purpose to address the needs of displaced persons who "have been uprooted and dislocated":

> The amendment is designed to alleviate hardship which might be caused by a rigid requirement that visa applications "shall be filed only with a consular officer in whose district the applicant shall have established residence."

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[18] The Department's citation to a statement in the federal register to support this assertion is disingenuous. The Department drafted the self-serving language it cites when it amended 22 C.F.R. § 42.61 in specific response to this lawsuit.

H.R. Rep. No. 1365, 82d Cong., 2d Sess. 54 (1952). Consistent with congressional intent, the Department promulgated new regulations in 1952 requiring consular officers to process an alien's IV application in the consular district in which the alien resided, but also giving a consular officer "discretionary authority to accept an application from an alien . . . physically present" in the consular district. 17 Fed. Reg. 11,587 (1952).[19] Section 1202(a) embodies this principle of providing flexibility for the benefit of aliens as a limitation on the Secretary's consular venue discretion. *See Kent*, 357 U.S. at 125, 127.

Neither the legislative history nor the Department's practice preceding the enactment of the 1952 or the 1965 Acts suggests a congressional purpose to delegate to the Department the authority to discriminate against American citizens on the basis of race, sex or nationality in the administration of the INA's family reunification program. To the contrary, when the Department proposed in connection with the 1965 amendments to the INA that Congress give the Secretary certain authority to discriminate on the basis of nationality, Congress adamantly rejected any such delegation. The remarks of Representative Moore typified the congressional reaction to this proposal:

> The original administration bill provided for a wide grant of discretionary control over our immigration system. Under that proposal the executive could have used up to one-half of the quota numbers at his discretion. In the name of national security or diplomatic policy, the admission of aliens could have been subject to all sorts of political pressures internally and externally so far as this Nation's immigration policy is concerned. But this proposal was rejected. Your committee

[19] In 1966, the Department amended this regulation to provide that a "consular officer *shall accept* an application for an immigrant visa . . . if the alien is physically present" in the consular district. 31 Fed. Reg. 13,083 (1966) (emphasis added). The regulation was later amended to give a consular officer discretion to process the application of an alien even if he was not physically present in the consular district and remained in substantially the same form, *see* 22 C.F.R. § 42.61 (1993), until 1994 when it was amended in response to this litigation to give the Department discretion to require an alien to submit his application in any place of the Department's choosing.

> preserved for Congress . . . its historic responsibility and its constitutional prerogative.

111 Cong. Rec. 21,592 (1965).[20]

When Congress considers it necessary to give the Executive authority to draw distinctions among classes of aliens, it knows how to and does so explicitly. For example, Congress has granted such authority to the President, in certain limited circumstances. *See* 8 U.S.C. § 1182(f) (delegating to the President alone authority to issue "a proclamation" suspending entry of "any class of aliens" when he finds entry of that class "would be detrimental to the interests of the United States"). Consistent with this congressional purpose, the President has used this authority sparingly, and only in extraordinary circumstances and national emergencies. Other administration officials have no similar authority, except by express subdelegation by the President in his proclamation. *See, e.g., Allende v. Shultz*, 845 F.2d 1111, 1118-19 (1st. Cir. 1988); *Abourezk*, 785 F.2d at 1049; *Jean v. Nelson*, 727 F.2d 957, 966 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

In *Kent v. Dulles*, the Court struck down the Department's passport policy as *ultra vires* without reaching the question of constitutionality. 357 U.S. at 116. Similarly, this Court may hold that Department officials acted without statutory authority in adopting their discriminatory policy. Alternatively, should this Court reach the constitutional question, it is clear that because the Department in this case may not invoke the principle of plenary congressional power over immigration to insulate itself from heightened scrutiny, the Department must establish that its discriminatory policy is narrowly tailored to further a compelling governmental interest.[21] The Department has never asserted any

[20] *See also* 111 Cong. Rec. 21,759 (1965) ("This bill . . . vigorously rejects the proposed delegation of congressional authority to the executive for establishing policy to govern the admission of immigrants into the United States.") (remarks of Rep. Feighan); *id.* at 21,759 (similar remarks of Rep. McCulloch); *id.* at 21,771(similar remarks of Rep. Poff).

[21] *See e.g., American Baptist Churches v. Meese*, 712 F. Supp. 756, 773 (N.D. Cal. 1989) ("The Executive's allegedly chronic failure to abide by its Congressional mandate [not to consider nationality when applying the asylum laws] could constitute a denial of equal protection of the laws."); *Haitian Refugee*

justification for its conduct that could survive such searching judicial scrutiny, and certainly nothing in the record provides any support for that proposition.

III. THE STATE DEPARTMENT'S POLICY IS ARBITRARY AND CAPRICIOUS.

For the 14 years preceding its shift in policy in April 1993, the Department processed the current IV applications of Vietnamese beneficiaries in Hong Kong without incident. The Department continued to process such applications after the adoption of the CPA in 1989, without regard to whether or not the IV beneficiary had been "screened-in." Such processing in Hong Kong was required by the Department's then current regulations and was fully consistent with what the Department itself has described as its "historical" practice of processing IV applications in the consular district in which the applicant resides. *See* pp. 33-34 & n.19, *supra* and p. 49 & n.31, *infra*; Pet. Br. at 24, 42.

Prior to this litigation, the only public explanation the Department ever gave for the April 1993 change in its policy was in its letter to respondents informing them that "[u]nder the CPA, those not recognized as refugees . . . must return to Vietnam to resettle in a third country." JA 64-65. In a December 1990 cable to the U.S. Consulate in Hong Kong, however, the Department took the opposite view of the CPA, explaining that requiring a screened-out IV beneficiary to return to Vietnam to pursue resettlement is:

> *not at all necessary to preserve the integrity of the CPA* . . . . Post maintains . . . that processing subject's IV case in Hong Kong would contravene the CPA because subject has been determined to be a non-refugee. That would of course be true if we were proposing to resettle her as a refugee. However, she would be coming as an immigrant and, as Post reports . . ., *all major resettlement countries have made similar requests to release detainees for immigration*.

JA 115-16 (emphasis added); *see also* JA 72-73.[22]

When it reversed its position in April 1993, the Department provided no explanation of why its earlier interpretation of the CPA was incorrect, or why it changed its view. It gave no notice to IV applicants about its new policy until many months later, and in the meantime simply stopped processing their visas. It changed its policy knowing that the new policy would severely prejudice IV applicants, who would face continued hardship whether they remained in detention or returned to Vietnam, as well as their American sponsors, who would remain separated from their families. This kind of sudden and unexplained departure from an agency's long-standing practice, undertaken secretly and implemented through delay and inaction, cannot survive under the APA. *Atchison, T. & S. F. R. Co. V. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973).

During the course of this litigation, the Department has also defended its new policy on the ground that its previous practice had the effect of discouraging voluntary repatriation by detainees who had been screened-out. This "*post hoc* rationalization" for the Department's shift in practice is entitled to no weight. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971). Moreover, this purported justification finds no support in the record. The number of beneficiaries is only a minute percentage of the total number of boat people detained in Hong Kong, the vast majority of which have no possibility of obtaining immigrant status. JA 116-17. It defies common sense to suggest that asylum seekers, who after years of detention are fully aware that they do not meet U.S. immigration criteria, are influenced in their decision to remain in squalid detention centers by IV processing of the relatively few who do. JA 135; JA 151-52.. Experience has shown that that decision is "driven by much more significant factors such

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Center, 503 F. Supp. at 532 (holding that INS program that discriminated against Haitian asylum-seekers on basis of nationality was not in conformity with statutes passed by Congress and, hence, was "offensive to every notion of constitutional due process and equal protection").

[22] In view of the fact that all other major resettlement countries have also performed IV processing in Hong Kong with the acquiescence of the HKG, the Department's self-serving and *post hoc* assertion that its policy shift was taken in response to objections from other countries is also not credible.

as the conditions of confinement, the prospects of being screened-in as a refugee, and the [boat people's] perception of what their situation would be like if they returned to Vietnam." JA 135; JA 152.[23]

IV. THE DEPARTMENT'S UNLAWFUL POLICY IS NOT IMMUNE FROM JUDICIAL REVIEW.

The Department concedes, as it must, that the federal courts may entertain challenges to the Department's immigration policies based on the violations of the constitutional rights of U.S. citizens. Pet. Br. at 32. *See, e.g., Fiallo*, 430 U.S. 787; *Kleindienst*, 408 U.S. 753. Thus, there is no question that the Court may consider Mr. Vo's equal protection claim.

The only issue is whether the Court may consider respondents' claims that the Department's policy violates § 1152(a)(1) of the INA and is arbitrary and capricious. The Department claims that this Court may not because the INA "impliedly precludes" APA review. This is not the first time the Government has raised the issue in this Court. In *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993), the Government made the exact argument it advances here in virtually the same language in order to evade review of the Attorney General's policy of intercepting Haitian refugees at sea and forcibly repatriating them to Haiti. This Court proceeded to review the merits of this policy without honoring the reviewability argument with so much as a footnote.

The Department also argues that this Court cannot review its unlawful policy because it is "committed to agency discretion by law." This assertion is also erroneous.

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[23] At a minimum, the fact that the Department has publicly explained its policy shift on grounds that it had privately repudiated creates an issue of fact concerning the Department's true motives in adopting its discriminatory policy. In view of the fact that the Department has so far successfully resisted all efforts to take discovery, there is no basis to affirm the district court's grant of summary judgment. Accordingly, should this Court conclude that the Department's actions were authorized under the INA and the Constitution, and that the present record does not permit it to conclude that the 1993 policy shift violated the APA, the Court should remand for further proceedings on the issue whether the Department's policy shift was arbitrary and capricious.

A. The INA Does Not Preclude Judicial Review of Unlawful State Department Action.

The APA authorizes a reviewing court to "hold unlawful and set aside agency action . . . found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional . . . power [or] (C) in excess of statutory authority." 5 U.S.C. § 706(2). Under the APA, this right of review is made available to any "person . . . adversely affected or aggrieved by agency action." 5 U.S.C. § 702.

1. Respondents are authorized to seek APA review under the INA.

The Department does not argue that the INA precludes judicial review of challenges by American citizens who are adversely aggrieved by State Department action that keeps them separated from their family members. Instead, the Department contends in a footnote (at 35 n.25) that American citizens who, like Mr. Vo, seek to reunite with their family members are not within the zone of interest protected by the INA because any interest they have "ends with the processing of their [IV] petition by the INS." In order to establish this claim, the Department must show that Mr. Vo's "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987). This it cannot do.

As we have shown (at 26 & n.15 *supra*), one of Congress' principal purposes in removing race and nationality as a bar to immigration was to ensure that "American citizens be accorded equal consideration in bringing their loved ones here." Similarly, in giving sponsorship rights to American citizens, Congress intended to give those citizens the right to physically reunite with their family members (so long as those family members meet the eligibility requirements for an IV) in this country, not merely to give them a meaningless piece of paper from the INS. *See* pp. 25-26 & n.15 *infra*. If the INS grants their petitions but the State Department prevents their reunion by its unlawful policy governing issuance of visas, those Americans are deprived of their statutory right. The interests of American citizens, like Mr. Vo, are far more than "marginally related" to Congress' purposes and

they, thus, have standing to challenge agency actions interfering with the issuance of immigrant visas for their alien relatives.

The Department does not contest that Ms. Vo was "adversely affected or aggrieved" by its action in refusing to process her IV application in Hong Kong. Yet the Department asserts (at 30) that because Ms. Vo is "an alien residing abroad," the APA's "generous review provision" is unavailable to her. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955). Nothing in the APA or the INA, however, suggests a congressional intent to preclude APA review to aliens outside our borders. The APA provides a cause of action to any "person" aggrieved by agency action. 5 U.S.C. § 702. It "does not say 'any citizen'. It does not say 'any person physically present in [the] United States'. . . . The emphasis is on the breadth of coverage." *Estrada v. Ahrens*, 296 F.2d 690, 694 (5th Cir. 1961). Applying the plain language of the APA, both this Court and the courts of appeals have routinely entertained APA challenges brought by aliens residing abroad who, like Ms. Vo and her U.S. citizen father, are adversely affected by agency action.[24]

2. The APA's strong presumption in favor of judicial review applies to agency action under the INA.

"From the beginning," this Court has recognized that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Lab. v. Gardner*, 387 U.S. 136, 140 (1967). Thus, in considering whether the INA precludes review of respondents' claims, this Court must "begin with the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

[24] *See, e.g., Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) (reviewing challenge by non-resident Haitian boat people to INS repatriation policy); *Jean v. Nelson*, 472 U.S. 846 (1985) (reviewing challenge by excludable Haitians to INS parole policy); *Mulligan v. Schultz*, 848 F.2d 655 (5th Cir. 1988) (entertaining challenge by nonresident aliens to validity of regulations pursuant to which U.S. consular officers refused to accept their IV applications); *Silva v. Bell*, 605 F.2d 978, 984-85 (7th Cir. 1979); *De Avilla v. Civiletti*, 643 F.2d 471 (7th Cir. 1981), *cert. denied*, 454 U.S. 860 (1981); *Constructores Civiles de Centroamerica, S.A. (Conica) v. Hannah*, 459 F.2d 1183, 1190 (D.C. Cir. 1972); *Haitian Ctrs. Council v. Sale*, 823 F. Supp. 1028, 1046 (E.D.N.Y. 1993); *DKT Memorial Fund, Ltd. v. A.I.D.*, 691 F. Supp. 394, 399-400 (D. D.C. 1988), *aff'd in pertinent part and rev'd in part*, 887 F.2d 275, 281-82 (D.C. Cir. 1989); *People of Saipan by Guerrero v. United States Dep't of Interior*, 356 F. Supp. 645, 653 (D. Haw. 1973), *aff'd as modified*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

Soon after the enactment of the INA in 1952, this Court ruled that administrative decisions under the INA made both in the context of deportation *and exclusion* are reviewable under the APA. *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955); *Brownell v. Tom We Shung*, 352 U.S. 180, 184 (1956). "The teaching of those cases is that the Court will not hold that the broadly remedial provisions of the Administrative Procedure Act are unavailable to review administrative decisions under the [INA] in the absence of clear and convincing evidence that Congress so intended." *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962). Following this teaching, this Court has repeatedly applied the strong presumption of APA reviewability in cases arising under the INA. *See, e.g., Reno v. Catholic Social Servs.*, 509 U.S. 43, 63-64 (1993); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991); *Jean v. Nelson*, 472 U.S. 846 (1985). In *McNary*, for example, this Court declared that the INA's restrictions on judicial review of individual adjudications must not be read to preclude judicial review of constitutional and statutory challenges to general policies and procedures affecting the rights of aliens, in "the absence of clear congressional language mandating preclusion." 498 U.S. at 483-84.

Stubbornly unwilling to accept the "teaching of [these] cases," the Department argues (at 20,28) that "the usual presumption in favor of judicial review does not operate" here because "this case involves the power of exclusion." The Department cites a series of cases decided prior to the enactment of both the APA and the INA. The APA, however, ensured reviewability of all agency action "except to the extent" that the statute at issue "preclude[s] judicial review." 5 U.S.C. § 701(a). In *Tom We Shung*, this Court, noting that absent "clear language or supersedure the expanded mode of review granted by [the APA] cannot be modified," squarely rejected the notion that this presumption of judicial review is somehow inapplicable to a case involving the power of exclusion. 352 U.S. at 185.

Apart from predating the APA, the Department's citations do not even relate to the type of challenge to agency action that is at issue here and that is the subject of APA review. Rather, these cases deal almost exclusively with constitutional challenges to the authority of *Congress* to make rules concerning the admission and exclusion of aliens, and stand only for the proposition that such *congressional* action is "largely immune from judicial control." *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953). However, unlike Congress, to which "the formulation of [immigration] policies is entrusted exclusively," *Galvan*, 347 U.S. at 531, the State Department enjoys no such immunity. Long before the enactment of the APA and the INA, this Court had recognized in cases involving the exclusion of aliens that it is within "the province of the courts . . . to prevent abuse" of the authority delegated to administration officials by Congress. *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920); *accord Gegiow v. Uhl*, 239 U.S. 3, 9-10 (1915). The Department's "discretion over the admission and exclusion of aliens . . . extends only as far as the statutory authority conferred by Congress" *Abourezk*, 785 F.2d at 1061. *See* pp. 29-30 *supra*.

Unable to cite any relevant immigration authority, the Department baldly asserts (at 19) that the presumption in favor of judicial review "runs aground" in this case because it arises in the context of foreign affairs. This Court, however, has held that it must not "shirk [its] responsibility" under the Constitution to interpret the law "merely because [its] decision may have significant political overtones" or touch upon the conduct of foreign policy. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). As Justice White explained in *Japan Whaling*, when an action "presents a purely legal question of statutory interpretation," a "separate indication of congressional intent to make agency action reviewable under the APA is not necessary" even if significant foreign policy interests, including U.S. commitments under an international agreement, are involved. *Id.* at 230 and n.4. "[I]nstead, the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of a legislative intention to preclude review."

Id.; *see also Baker v. Carr*, 369 U.S. 186, 211 (1962) (it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance").[25]

3. The Department cannot demonstrate by "clear and convincing evidence" that Congress intended to preclude review of its unlawful policy.

As the Department acknowledges (at 27), no provision in the INA expressly limits judicial review of the Department's policies and procedures affecting aliens outside the United States. The INA, "far from precluding review, affirmatively provides for it" in 8 U.S.C. § 1329, which provides that "'the district courts . . . shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter.'" *Abourezk*, 785 F.2d at 1051. The Department's argument (at 33) that this provision is jurisdictional and creates no cause of action misses the point. The "courts have reasonably inferred from this broad grant of jurisdiction that 'clear and convincing evidence' of a congressional intent to preclude judicial review [in immigration matters] is lacking." 785 F.2d at 1050.

The absence of explicit language prohibiting review of the Department's visa issuance policy stands in stark contrast to provisions of the INA that specifically preclude judicial review of certain other types of agency actions. *See, e.g.*, 8 U.S.C. § 1160(e)(1), 8 U.S.C. § 1254a(b)(5)(A), 8 U.S.C. § 1255a(f)(1). Given the presumption that "Congress acts intentionally" when it "includes particular language in one section of a statute but omits it in another," the existence of these provisions virtually compels the conclusion that Congress intended to make reviewable the

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[25] The Department's citation to *Department of Navy v. Egan*, 484 U.S. 518 (1988), is inapposite. That case involved the issuance of a security clearance, "a sensitive and inherently discretionary judgment call [which] is committed by law to the appropriate agency of the Executive Branch." 484 U.S. at 527. The basis for the Court's ruling that the normal presumption of judicial review did not operate in that context was that the power of the executive to classify or control access to national security secrets flows from his role as Commander in Chief and "exists quite apart from any explicit congressional grant." *Id.* This case, by contrast, concerns an agency's abuse of delegated power that is entrusted exclusively to Congress—the review of which is, of course, a time honored judicial function.

Department's polices and procedures. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

Unable to rely on any expressed preclusion of judicial review in the INA, the Department argues that Congress impliedly precluded judicial review of the type of challenge at issue in this case from: (1) a judicial invention known as the doctrine of "consular nonreviewability" and, (2) § 1105a of the INA, which restricts the forms of review that can be had from final orders of exclusion and deportation. Nothing could be further from the truth.

The consular nonreviewability doctrine insulates from judicial review the decision of a consular officer whether to grant or deny a particular visa.[26] That doctrine has no application to this case, because it does not involve the decision of a consular officer to grant or deny a particular visa. Rather, this case involves a general policy decision that, as the U.S. Consulate explained to the HKG, came "from the Department of State in Washington, D.C.", instructing the Consulate that it "may not process the immigrant visa request of anyone awaiting a screening decision [or] screened-out as a refugee." JA 78-79. It is well established that the consular nonreviewability doctrine does not preclude challenges to the regulations, policies, practices or "decisions of State Department officials rather than consular officers abroad" that relate to visa matters. *Abourezk*, 785 F.2d at 1051 n.6.[27]

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[26] The doctrine, which has never been sanctioned by this Court, applies without regard to whether the alien visa applicant is located in the United States or abroad. *See, e.g., London v. Phelps*, 22 F.2d 288 (2d Cir. 1927), *cert. denied*, 276 U.S. 630 (1928).

[27] *See, e.g., Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988) (the "principle that 'decisions of United States consuls on visa matters are nonreviewable' . . . is inapplicable" to cases in which the aliens are "challenging the authority of the Secretary of State" to promulgate regulations which prevented consular officers from "accept[ing] their applications for immigration visas"); *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988); *International Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 801 (D.C.Cir. 1985) (cases "concern[ing] challenges to a decision by a consular officer on a particular visa application . . . ha[ve] no application here because . . . the general Operations Instructions promulgated by the INS violate the pattern set forth in [the INA]").

Acknowledging (at 33-34) that the consular nonreviewability doctrine does not by itself preclude review in this case, the Department falls back on 8 U.S.C. § 1105a(b), which provides that aliens subject to "a final order of exclusion . . . may obtain judicial review of such order by habeas corpus proceedings and not otherwise." The Department reckons (at 29) that the enactment of this exclusive means of judicial review for aliens subject to final orders of exclusion somehow "indicates that [Congress] intended to preclude APA review at the behest of aliens residing abroad." The Department's argument is utterly baseless. Section 1105a does not *preclude* judicial review of anything. Intended to address the specific problem of repetitive and dilatory actions brought by individual deportable or excludable aliens,[28] § 1105a simply eliminated a "particular mode of APA review. . .—an action for injunctive relief in federal district court" and "replaced it with direct review in the courts of appeals" in deportation cases and habeas corpus review in the district courts in exclusion cases. *I.N.S. v. Doherty*, 502 U.S. 314, 330 (1992) (Scalia, J., concurring in the judgment and dissenting in part). As Justice Scalia observed in his opinion in *Doherty*, "*Pedreirio* remains the law," *id.*, as does the "teaching" of *Tom We Shung* that the APA's presumption of judicial review is fully applicable to exclusion decisions.

Both this Court and the courts of appeals have consistently held that no broad preclusion of judicial review can be inferred from § 1105a, which is limited to the review of formal deportation and exclusion orders.[29] The precedents of this Court clearly

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[28] The "fundamental purpose" of § 1105a was to "frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation [and exclusion] were forestalling departure by dilatory tactics in the courts." *Foti v. I.N.S.*, 375 U.S. 217, 224 (1963); *see also* H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22-23 (1961).

[29] *See, e.g., Cheng Fan Kwok v. I.N.S.*, 392 U.S. 206, 214 (1968) ("[i]n situations to which the provisions of [1105a(a)] are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court"); *Rafeedie v. I.N.S.*, 880 F.2d 506, 510-513 (D.C.Cir. 1989) (§ 1105a(b) does not apply to summary exclusion orders under 8 U.S.C. § 1225(c)); *Jean v. Nelson*, 711 F.2d 1455, 1505 n.57 (11th Cir. 1983), *overruled*

establish that § 1105a(a) does not in any way limit the ability of aliens either within or without the territory of the United States to seek judicial review of a systemic challenge to agency policies or procedures (as opposed to individual deportation and exclusion orders). In *McNary v. Haitian Refugee Centers*, for instance, plaintiffs brought a class action alleging that INS procedures under an amnesty program violated the INA and the Constitution. As the Department does here, the INS in *McNary* argued that plaintiffs' statutory and constitutional challenges were foreclosed by virtue of a provision in the INA precluding "judicial review of a determination respecting an application for adjustment of status" except in "the judicial review of an order of exclusion or deportation . . . under section 1105a." 498 U.S. at 486. Applying the "well-settled presumption favoring . . . judicial review of administrative action," this Court interpreted the reference to a determination as "describing the denial of an individual application . . . rather than the practices and policies used by the agency in processing applications." *Id.* at 496, 492. The Court held that a "general collateral challenge" to such illegal policies and practices was reviewable under the INA. *Id.*; *see also Reno v. Catholic Social Servs.*, 509 U.S. at 55-56; *Jean v. Nelson*, 472 U.S. at 847, 853, 857 (holding that INS officials are "bound by the provisions of the [INA] and of the regulations" and remanding to the district court to determine whether those officials exercised their "broad discretion" to deny parole under the INA and the regulations "without regard to race or national origin").

The crux of the Department's arguement (at 29) is that permitting judicial review in this case would create a supposed anomaly in which aliens outside the United States would be able to take advantage of avenues of judicial review that are unavailable to aliens in exclusion proceedings. This supposed anomaly, however, does not exist: Aliens inside the United States in exclusion proceedings can challenge individual decisions ordering their exclusion by bringing a habeas corpus proceeding (but not by an APA action). Aliens outside the United States (or

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in part by 727 F.2d 957 (11th Cir. 1984), *aff'd* 472 U.S. 846 (1985) ("§ 1105a is inapplicable altogether if the asserted claim is unrelated to exclusion hearings").

for that matter aliens inside the United States) cannot challenge the decisions of individual consular officers denying them admission to this country by virtue of the doctrine of consular nonreviewability.[30] But both aliens inside and outside our borders may seek APA review of generally applicable State Department regulations, policies and procedures that adversely affect or aggrieve them.

In the end, the Department urges this Court to ignore the APA and the INA and, instead, to craft a judge made doctrine barring judicial review of any decision the Department may make that relates to the admission of aliens from abroad. Under the Department's proposal, the federal courts could not review a Department decision to replace or modify the allocation system and family preference categories set up by Congress with a new immigration program in which admission is based on considerations of race, national origin and sex. It is inconceivable that this was the intent of Congress when it enacted the APA's broad grant of, and the INA's narrow limitations on, judicial review.

B. The Department's Unlawful Conduct Has Not Been Committed To Its Discretion.

The Department argues that its discriminatory policy of refusing to process the IV applications of Vietnamese nationals is "committed to agency discretion by law" within the meaning of 5 U.S.C. § 701(a)(2). This Court has described this exception to judicial review as "a very narrow" one, "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve*

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[30] The Department places much reliance on a single line of dictum in a footnote in *Tom We Shung*, in which the Court stated that its opinion did not suggest that a nonresident alien "may avail himself of the declaratory judgment action by bringing the action from abroad." 352 U.S. at 184 n.3. Taken in context, that sentence is clearly a reference to the rule barring review of the decision of a consular officer denying an alien admission to this country. The Court was not addressing the case of respondents who, rather than challenging an individual exclusion decision, are challenging the lawfulness of an agency policy of general application.

Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (citing S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)).

The Department asserts that 8 U.S.C. § 1202(a) commits to its unfettered and nonreviewable discretion all matters relating to the admission of aliens. Section 1202(a), however, simply provides that visa applicants must apply in consular districts as the Secretary "by regulation" specifies. The Department claims (at 36) that because § 1202(a) "itself establishes no substantive standards for the exercise of the consular venue authority," its decisions in this area are committed to its discretion by law. Were broad grants of rulemaking authority committed to agency discretion within the meaning of § 701(a)(2), however, nonreviewability based on § 701(a)(2) would be the rule, rather than the "very narrow" exception it is. The Department's rulemaking authority under § 1202(a) does not exist in a vacuum, but rather in the overall context of the INA, including the prohibition on nationality-based discrimination in the issuance of immigrant visas.

The Department's argument is based on the false assumption that 8 U.S.C. § 1152(a)(1) does not apply to its discriminatory visa processing policy. If (as we demonstrated above) that section is applicable, then there is a "law to apply." The "statutory command" prohibiting discrimination in the issuance of an immigrant visa "does not commit such [discrimination] to the Secretary's discretion." *Brock v. Pierce County*, 476 U.S. 253, 260 n.7 (1986).

Even assuming the inapplicability of § 1152(a)(1), the Department is wrong when it asserts that this case presents one of those "rare circumstances where the relevant statute has been "'drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). In *Chaney*, this Court distinguished the situation when an agency exercises its discretion negatively in failing to undertake enforcement action, which is "generally committed to agency action," and the situation in which the agency does act. 470 U.S. at 831. In the latter case, the Court found that the affirmative:

> action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers.

Id. at 832. The decision of the Department to refuse visa processing in Hong Kong is an affirmative act that can be reviewed to determine not only whether it was unauthorized by or contrary to law, but also to determine whether it was arbitrary and capricious.

The Department is unable to show that "Congress intended the Secretary's own mental processes, rather than other more objective factors, to provide the standard for gauging the Secretary's exercise of discretion." *Franklin v. Massachusetts*, 505 U.S. 788, 817 (1992) (Stevens, J., concurring). As we have explained (at 33-34 *supra*), the legislative history of the INA establishes that Congress did not rely upon the Secretary's "mental processes" when it enacted § 1202(a), but instead had clear objective criteria in mind applicable to the determination of consular venue. Under those criteria, which were embraced in the Department's regulations for more than four decades before it adopted its discriminatory policy in 1993, the guiding rule was that "the consular district of the applicant's . . . foreign residence . . . is the *only* post *required to accept* the case for processing, although some other post might do so as a matter of discretion." FAM § 42.61, N.2.1. (emphasis added).[31] Throughout the protracted course of this litigation, the Department has been unable to cite a single instance in which it has departed from this practice. Nor has it been able to cite a single instance in which it has found it necessary to discriminate against a class of aliens on the basis of nationality in making its consular venue determinations.[32]

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[31] For nearly 30 years since 1966 (see note 19 *supra*), the Department's regulations also required that an alien's visa be processed in the place in which the alien is physically present. Where an alien was neither physically present nor resident in a consular district, the regulations authorize visa processing in another consular district in accordance with simple objective criteria that have been in place since the adoption of the INA. FAM § 42.61, N.2.2. Thus, contrary to the Department's assertion (at 37), the determination of consular venue involves no "complicated balancing" of factors.

[32] The Department does note that it has special rules directing applicants from countries in which there is no consular office to other countries for visa processing. Because no applicant can apply for a visa in a country with no

Review of an agency's sudden and unexplained departure from a long-standing practice, initiated to honor an express statement of congressional intent, is clearly within the competence of the federal courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

Robert B. Jobe
LAW OFFICES OF ROBERT JOBE
360 Pine Street
3rd Floor
San Francisco, CA 94104
(415) 956-5513

William R. Stein
Counsel of Record
Daniel Wolf
M. Kathleen O'Connor
HUGHES HUBBARD & REED LLP
1300 I Street, N.W.
Suite 900 West
Washington, DC 20005
(202) 408-3600
Counsel for Respondents

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consular office, these rules necessarily apply to all visa applicants who live in such countries, regardless of their nationality. While the Department also asserts, without explanation or support, that consular venue determinations are often based on security concerns, it can come up with no case in which it has found it necessary based on such concerns to institute a discriminatory consular venue rule requiring that all aliens of a given nationality apply for an IV at a particular consular office.

STATUTORY APPENDIX

Constitution

U.S. CONST. Amend. V.

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Statutes

5 U.S.C. § 702. Right of review.

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 706. Scope of review:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine

the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

8 U.S.C. § 1152(a) (subsequent to 1965 amendment):

(a) No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence, except as specifically provided in sections 1101(a)(27), 1151(b), and 1153 of this title: *Provided*, That the total number of immigrant visas and the number of conditional entries made available to natives of any single foreign state under paragraphs (1) through (8) of section 1153(a) of this title shall not exceed 20,000 in any fiscal year: *Provided further*, That the foregoing proviso shall not operate to reduce the number of immigrants who may be admitted under the quota of any quota area before June 30, 1968.

8 U.S.C. § 1152(a)(1) (1996) (as currently in effect):

(a) Per country level

(1) Nondiscrimination

Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

Regulations

22 C.F.R. § 42.61(a) (1993)

Under ordinary circumstances, an alien seeking an immigrant visa shall have the case processed in the consular district in which the alien resides. The consular officer shall accept the case of an alien having no residence in the consular district, however, if the alien is physically present and expects to remain therein for the period required for processing the case. An immigrant visa case may, in the discretion of the consular officer, or shall, at the discretion of the Department, be accepted from an alien who is neither a resident of, nor physically present in, the consular district. An alien residing in the United States is considered to be a resident of the consular district of last residence abroad.

22 C.F.R. § 42.61(a) (as amended on August 1, 1994, 59 Fed. Reg.39,955)

Unless otherwise directed by the Department, an alien applying for an immigrant visa shall make application at the consular office having jurisdiction over the alien's place of residence; except that, unless otherwise directed by the Department, an alien physically present in an area but having no residence therein may make application at the consular office having jurisdiction over the area if the alien can establish that he or she will be able to remain in the area for

the period required to process the application. Finally, a consular office may, as a matter of discretion, or shall, at the direction of the Department, accept an immigrant visa application from an alien who is neither a resident of, nor physically present in, the area designated for that office for such purpose. For the purposes of this section, an alien physically present in the United States shall be considered to be a resident of the area of his or her last residence prior to entry into the United States.

(8)

No. 95-1521

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., PETITIONERS

v.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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In the Supreme Court of the United States

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REPLY BRIEF FOR THE PETITIONERS

1. Respondents argued below and in their merits brief in this Court that the consular venue policy they challenge unlawfully discriminates in the "issuance" of visas on the basis of "nationality," in violation of 8 U.S.C. 1152(a)(1). See Resp. Br. 16-22. As we explain in our opening brief (Gov't Br. 40-49), that argument was wrong even under the law as it stood at the time. Section 1152(a)(1) applies to substantive determinations regarding the granting or denial of immigrant visas, not procedural matters such as the location at which visa applications will be accepted and processed. The latter subject is separately governed by 8 U.S.C. 1202(a), which provides that an alien seeking a visa "shall make application

therefor in such form and manner and at such place as shall be by regulation prescribed." Moreover, the challenged venue policy applies to particular Vietnamese migrants in Hong Kong not because of their nationality, but because of their status under the Comprehensive Plan of Action (CPA), an international agreement that respondents do not challenge. Cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 76-79 (1981); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 275-281 (1979).

Whatever merit respondents' claim under 8 U.S.C. 1152(a)(1) might once have had, however, it has now been eliminated by recent legislation. On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRA) (enacted as Division C of the Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009). Section 633 of the IIRA amends the Immigration and Nationality Act (INA) by adding the following provision to 8 U.S.C. 1152(a)(1):

> (B) Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed.

See 142 Cong. Rec. H11,827 (daily ed. Sept. 28, 1996).

There can be no doubt that the amendment to 8 U.S.C. 1152(a)(1) governs the disposition of this case. Respondents seek prospective injunctive relief requiring the State Department to process the visa applications of screened-out migrants in Hong Kong. In a case seeking prospective relief, a court is to apply the law in effect at the time of its decision. *Landgraf* v. *USI Film Products*, 511 U.S. 244, 273-274 (1994). An injunction entered under prior law cannot remain in effect. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1885); *Mount Graham Coalition* v. *Thomas*, 89 F.3d 554, 556-557 (9th Cir. 1996). That rule is especially sound here, because the legislative history shows that the amendment was intended not to change the law, but rather to "clarify" that 8 U.S.C. 1152(a)(1) does not apply to the Secretary's consular venue determinations. H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 248 (1996) (142 Cong. Rec. H10,906 (daily ed. Sept. 24, 1996)) (quoted at page 5, *infra*); S. Rep. No. 249, 104th Cong., 2d Sess. 19 (1996); H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 270 (1996). The legislative history further shows that the amendment was enacted with the understanding that it would govern this very case and "would have the immediate effect of forcing several dozen Vietnamese nationals who are family members of United States citizens to return to Vietnam to have their visas processed." 142 Cong. Rec. H11,068 (daily ed. Sept. 25, 1996) (Rep. Conyers); see also *id.* at H11,066 (Rep. Smith); 141 Cong. Rec. S6105 (daily ed. May 3, 1995) (section-by-section analysis of bill proposed by Administration containing provision ultimately enacted as § 633 of IIRA).

The recent amendment makes clear that respondents' statutory claim based on 8 U.S.C. 1152(a)(1) is no longer available. That claim was the sole ground for the court of appeals' judgment in favor of respondents. See Pet. App. 8a-12a. Respondents also present two alternative grounds for affirmance, however: first, that the visa venue policy is arbitrary and capricious within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A) (Resp. Br. 36-38); and second, that it violates the equal protection component of the Fifth Amendment's Due Process Clause (Resp. Br. 25-36). The district court rejected those claims as "meritless," Pet. App. 27a n.3, but the court of appeals had no occasion to address them. As we

explain below, respondents' APA and constitutional claims are indeed meritless, and the recent amendment of 8 U.S.C. 1152(a)(1) reinforces that conclusion. But because the court of appeals did not address those issues, and because its decision was based solely on a reading of the INA that is now foreclosed, we suggest that the Court vacate the judgment below and remand the case to the court of appeals for further consideration in light of the intervening legislation. See *INS* v. *Elramly*, No. 95-939 (Sept. 16, 1996); *Bureau of Economic Analysis* v. *Long*, 454 U.S. 934 (1981).

2. a. The court of appeals concluded that the U.S. citizens who filed immigrant visa petitions on behalf of migrants in Hong Kong had a right of judicial review under the APA to challenge the consular venue policy as unlawful under 8 U.S.C. 1152(a)(1), since (in the court's view) the visa petitioners were within the zone of interests protected by the general family unification purposes of the INA. See Pet. App. 5a-6a; but see Gov't Br. 35 n.25. The court did not address the further questions of whether judicial review of that claim is nevertheless precluded by the INA (see 5 U.S.C. 701(a)(1)), and whether consular venue determinations are committed to agency discretion by law (see 5 U.S.C. 701(a)(2)). Nor did the court below consider in any respect whether respondents have a right to judicial review under the APA of their remaining non-constitutional claim—namely, that the visa venue policy is arbitrary and capricious within the meaning of 5 U.S.C. 706(2)(A). That threshold reviewability issue is especially significant now, for the legislative history of the recent amendment confirms that consular venue matters are committed to the unreviewable discretion of the Secretary of State. The Conference Report on the IIRA states:

> Section 633—House section 803(a) recedes to Senate amendment 172. This section amends INA section 202(a)(1) [8 U.S.C. 1152(a)(1)] to clarify that the Secretary of State *has non-reviewable authority* to establish procedures for the processing of immigrant visa applications and the locations where visas will be processed.

H.R. Conf. Rep. No. 828, *supra*, at 248 (emphasis added); accord H.R. Rep. No. 469, *supra*, Pt. 1, at 270. That determination by Congress is consistent with the fact that consular matters have been "traditionally regarded as committed to agency discretion," *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993), and that 8 U.S.C. 1202(a), which governs consular venue, provides no standards on which judicial review could be based.

b. Quite aside from Congress's recent confirmation of the point, however, it is clear that respondents have no right of judicial review. Respondents acknowledge that, under the doctrine of consular nonreviewability, an alien residing abroad has no right under the APA to judicial review of a consular decision to deny a visa. Resp. Br. 21, 44. But they contend that the consular nonreviewability doctrine has no applicability here because this case does not challenge a decision by a consular officer regarding a particular visa application. That argument fails to take into account the *foundation* of the doctrine of consular nonreviewability. That doctrine is not rooted solely in the preclusion of review under the INA itself, a comprehensive statutory scheme that allows for judicial review of actions concerning the admission of an alien to the United States only if the alien has arrived at our borders. See Gov't Br. 25-30. The doctrine is also rooted in the very nature of visa determinations, which constitute the exercise of the government's fundamentally political power to decide

whether, and under what circumstances, aliens residing abroad may be allowed to enter the country—or, as in this case, to receive permission (in the form of a visa) to travel to this country to seek admission. See Gov't Br. 22-23 & nn. 13, 14. As we have explained (Gov't Br. 19-25), the presumption in favor of judicial review under the APA does not operate in this context, or at least has been rebutted because of the subject matter at issue.

Accordingly, this case is not analogous to *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) (see Resp. Br. 46). There, the Court held that the preclusion of judicial review in 8 U.S.C. 1160(e)(1) for the special agricultural worker program did not apply to collateral challenges to procedures governing applications for adjustment of status, but only to determinations concerning the adjustment of status of individual aliens, which could be challenged only on judicial review of a final order of deportation under 8 U.S.C. 1105a. *McNary* involved aliens residing in the United States, who have traditionally had access to judicial review of matters affecting their deportation (whether by habeas corpus, APA review, or the special mode of review in 8 U.S.C. 1105a). The presumption of judicial review therefore was operative, and the Court allowed a collateral challenge to procedures of general applicability outside of 8 U.S.C. 1105a only because it found that channel inadequate for resolving such a claim. The question was whether that approach was foreclosed by specific language in 8 U.S.C. 1160(e)(1), and the Court, applying the presumption in favor of judicial review, held that it was not. 498 U.S. at 491-498; see also Pet. Br. 34 (discussing *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1985)). By contrast, aliens abroad have long been denied judicial review of administrative actions affecting their admission to the United States. See *Brownell* v. *Tom We Shung*,

352 U.S. 180, 184 n.3 (1956). It is irrelevant for purposes of that rule whether the alien challenges an individual determination by a consular officer or a rule of more general applicability that informed the consular officer's decision.

Respondents contend (Resp. Br. 40-41) that courts have entertained challenges to administrative actions brought by non-resident aliens under the APA. With a few exceptions, however, the cases cited by respondents either did not involve challenges by aliens residing abroad to decisions affecting their exclusion,[1] or did not directly address the issue presented here.[2] Of the three remaining cases,

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[1] *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43 (1993); *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991); *Jean* v. *Nelson*, 472 U.S. 846 (1985); *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956); *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955); *Kwock Jan Fat* v. *White*, 253 U.S. 454 (1920); and *Geigow* v. *Uhl*, 239 U.S. 3 (1915), all involved aliens who had reached the United States. *Constructores Civiles de Centroamerica, S.A. (Conica)* v. *Hannah*, 459 F.2d 1183 (D.C. Cir. 1972), involved a challenge by a foreign company to a government agency's contracting decision. *DKT Memorial Fund, Ltd.* v. *AID*, 887 F.2d 275 (D.C. Cir. 1989), involved a challenge by domestic and foreign organizations to government grant policies. *People of Saipan* v. *United States Dep't of Interior*, 356 F. Supp. 645 (D. Haw. 1973), aff'd, 502 F.2d 90 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975), addressed the standing of residents of the Trust Territory of the Pacific Islands to challenge agency action under the National Environmental Policy Act.

[2] In *Silva* v. *Bell*, 605 F.2d 978 (7th Cir. 1979), the court concluded that aliens residing abroad had Article III standing to challenge the allocation of immigrant visas, but it did not directly address the issue of APA review. In addition, the court's decision to allow prudential standing rested on the fact that the class included aliens in the United States. 605 F.2d at 984. *De Avila* v. *Civiletti*, 643 F.2d 471 (7th Cir. 1981), did not address standing or APA review, and the government pre-vailed on the merits in any event. *Allende* v. *Shultz*, 845 F.2d 1111 (1st Cir. 1988), which was similar to *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), involved a challenge by United States citizens to the denial of an immigrant visa to an alien residing abroad; the court noted that

one, *Estrada* v. *Ahrens*, 296 F.2d 690 (5th Cir. 1961), arose on quite different facts involving an alien who (unlike the migrants in Hong Kong) had previously been in the United States; it did not involve consular venue, and the court did not consider the significance of Congress's then-recent overruling of this Court's *Tom We Shung* decision. See Gov't Br. 25-28. A second, *Mulligan* v. *Shultz*, 848 F.2d 655 (5th Cir. 1988), likewise did not involve consular

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the alien herself had no standing to raise a constitutional claim (845 F.2d at 1114 n.4). *International Union of Bricklayers & Allied Craftsmen* v. *Meese*, 761 F.2d 798 (D.C. Cir. 1985), involved a challenge brought by U.S. citizens to INS guidelines that allowed certain aliens to obtain Department of Labor certifications (and, subsequently, nonimmigrant visas) to work in the United States. The court there concluded that APA review was not precluded by the doctrine of consular nonreviewability, since the plaintiffs were not challenging a determination in a particular case of matters that Congress left to executive discretion. *Id.* at 801. We believe that reasoning is incorrect to the extent it suggests that nonreviewability is limited to decisions denying individual visa applications, but we note that the plaintiffs there could point to a specific provision of the INA arguably giving them an interest in the labor-certification process that was, in turn, cognizable under the APA. See *ibid.*; 8 U.S.C. 1182(a)(14) (1982).

As respondents point out (Resp. Br. 38), the government made a nonreviewability argument in *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993). The Court did not address the question in its decision, but that hardly means that the Court held that APA review is generally available. Since the Court ruled in the government's favor on the merits, it may have chosen to assume, for the purpose of deciding the case, that the respondents could obtain review under the APA. Cf. *Air Courier Conference of America* v. *American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991). Furthermore, the respondents in *Sale* argued that the consular nonreviewability doctrine did not apply because the aliens there were seeking not to gain entry into the United States, but to prevent their forced return to Haiti, and that therefore the case did not involve considerations relevant to admission or exclusion. See Gov't Reply Br. at 3-4, Resp. Br. at 53-56, in *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (No. 92-344).

venue; it contains little reasoning, and, we submit, its ruling on APA review was incorrect.[3] And the third, *Haitian Centers Council, Inc.* v. *Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993), was subsequently vacated by the district court on the parties' stipulation.[4]

Rusk v. *Cort*, 369 U.S. 367 (1962), also does not suggest that aliens residing abroad may challenge consular venue policies under the APA. The Court found that the review provisions made available under the INA to natives living abroad who wished to challenge adverse citizenship determinations were optional, and were not intended to deny remedies that existed prior to enactment of the INA. *Ibid.* The Court also reached its conclusion in light of the serious constitutional questions that would be presented by a contrary ruling. See *id.* at 370; *id.* at 380-383 (Brennan, J., concurring) (noting that a contrary decision would mean that a person previously deemed to be an American citizen "may by unreviewable administrative action be relegated to the status of an alien"). Those factors are not present here. Prior to enactment of the INA, there was no right to judicial review of visa or other immigration matters at the behest of aliens abroad, see *Tom We Shung*, 352 U.S. at 184 n.3, 185 n.6, and no constitutional concern is raised by

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[3] The government prevailed on the merits in *Mulligan* and accordingly had no opportunity for further review of the APA issue.

[4] See *Cuban American Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1424 (11th Cir.) (discussing the vacatur), cert. denied, 115 S. Ct. 2578 and 116 S. Ct. 299 (1995). The Eleventh Circuit considered the same issue of APA review in *Cuban American Bar Ass'n*, 43 F.3d at 1428, and *Haitian Refugee Center, Inc.* v. *Baker*, 953 F.2d 1498, 1505-1507, cert. denied, 502 U.S. 1122 (1992), and concluded that aliens outside the United States challenging administrative action governing their "screening" as refugees had no right of review under the APA.

such a bar. See, *e.g.*, *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952).[5]

The recent amendments to the INA made by the IIRA manifest neither any relaxation of limitations on judicial review generally, nor any departure from the established rule that aliens abroad who are seeking admission to the United States have no right of judicial review. To the contrary, those amendments provide for further restrictions on administrative and judicial review even for aliens who have reached our shores and seek admission (see IIRA § 302(a) (adding 8 U.S.C. 1225(b)(1)(A)(iii)); IIRA § 306(a) (adding 8 U.S.C. 1252(a)(2)), and they expedite judicial review of all orders of removal by providing for such review directly in the courts of appeals, rather than by habeas corpus in the district courts in exclusion cases (see IIRA § 306(a) (adding 8 U.S.C. 1252(a)(1)). See also IIRA § 381 (restricting jurisdiction under 8 U.S.C. 1329 by excluding suits against federal officials). Moreover, as explained above (see pages 4-5, *supra*), the House and

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[5] Respondents also invoke (Resp. Br. 45) Justice Scalia's separate opinion in *INS* v. *Doherty*, 502 U.S. 314, 330 (1992), which noted that the standard of review of deportation orders formerly applied in actions under the APA is still applicable under 8 U.S.C. 1105a(a). But that opinion also noted that the APA itself provides that the proper proceeding is, presumptively, "the special statutory review proceeding relevant to the subject matter in a court specified by statute" (see 5 U.S.C. 703)—in the case of deportation orders, review under 8 U.S.C. 1105a(a). See 502 U.S. at 330 n.1. Justice Scalia's opinion does not discuss review of exclusion decisions, which, even for aliens in the United States, has been available only through habeas corpus, not the APA. See Gov't Br. 27. Nor does it suggest that aliens abroad, who cannot even seek habeas corpus review, have access to judicial review of immigration matters under the APA. And it certainly does not provide support for the proposition that, if the INA precludes review, or the subject is (like consular venue) committed to agency discretion, judicial review may nonetheless be had under the APA.

Conference Reports on the IIRA make clear that visa venue determinations in particular are "non-reviewable."

c. Even if judicial review were available, there is no substance to respondents' contention (see Resp. Br. 36-38) that the consular venue policy they challenge is arbitrary and capricious. The State Department's definitive policy, effective November 1, 1994, was adopted only after "[a] careful review." J.A. 218. The Department contemporaneously noted that there were "clear indications that our accepting these immigrant visa cases outside Vietnam is one of the factors discouraging screened-out asylum seekers from agreeing to repatriation, and thus seriously undermines the Comprehensive Plan of Action." J.A. 219.[6] The State Department, of course, previously had a different view, but the APA does not prohibit agencies from reexamining their policies. See *Smiley* v. *Citibank (South Dakota) N.A.*, 116 S. Ct. 1730, 1734 (1996).

The Department changed its consular venue policy after receiving "expressions of concern from UNHCR and first asylum countries" that the process of voluntary repatriation would be "cripple[d]" by "taking even a limited number of screened out Vietnamese as immigrants" directly from Hong Kong. J.A. 129. In addition, by 1994, the

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[6] Respondents argue (Resp. Br. 36) that there was not an adequate explanation of the Department's change in policy in April 1993. Whatever may have been the case with respect to that change, the policy under challenge now was adopted on November 1, 1994. The current policy was adopted only after the Department temporarily resumed the processing of screened-out migrants' visa applications in Hong Kong, and again found such processing detrimental. See Gov't Br. 8 n.6. The cable announcing the current policy explained that "the practice of processing applications" from screened-out migrants in Hong Kong "was having an adverse effect on U.S. foreign policy concerns in Asia." J.A. 219; see also 5 U.S.C. 553(a) (exempting foreign affairs functions from APA rulemaking requirements).

Department had concluded that "conditions in Vietnam [had] improved considerably." J.A. 197; see also J.A. 107, 130-132 (affidavits noting that, in 1990, there were "continuing uncertainties as to emigration out of Vietnam," but that, by 1994, the Orderly Departure Program (ODP) in Vietnam had become quite effective).[7] It was surely within the Department's purview to conclude, based on a thorough policy review, that the apparent possibility of immigration to the United States—realistic or not—could influence the screened-out migrants' attitude toward voluntary repatriation, and thus could undermine the complex arrangements embodied in the CPA. See J.A. 129, 219.[8] At the very least, the considered judgment on these matters by the executive officials charged with the

[7] In advocating the former policy, respondents principally rely (Resp. Br. 36-37) on a 1990 cable from the State Department to the U.S. consulate in Hong Kong setting forth the Department's policy at that time. See J.A. 114-117. But the cable elsewhere made clear that the former policy was based on a judgment that "[t]he uncertainties of emigration from Vietnam are still sufficient to make us wary of promoting a policy which would require return of currently eligible immigrants to that country for processing." J.A. 116. "Nevertheless," the cable continued, the "Department recognizes the desirability of a regime where all Vietnamese IV's [immigrant visa applicants] would be processed through ODP, and we will keep the matter under periodic review." *Ibid.* The current policy that respondents challenge was based on precisely such a review.

[8] The class of screened-out migrants in Hong Kong who might seek to apply for an immigrant visa to the United States is not closed. Even if a screened-out migrant were not today eligible to apply for such a visa, he might tomorrow become the beneficiary of an immigration preference by marrying a U.S. citizen or permanent resident, or as the result of an employment-based petition filed by an American employer-sponsor. Thus, as a result of the court of appeals' decision, even migrants not currently eligible for a preference may be less likely to volunteer to return to Vietnam, due to the prospect of processing immigrant visa applications in Hong Kong in the future.

conduct of the Nation's foreign policy cannot be set aside by a court as arbitrary and capricious—especially since Congress, having had the policy brought to its attention, has just responded by removing any statutory obstacle to its effectuation.

3. a. Finally, respondents argue that the visa venue policy at issue in this case must be subjected to strict scrutiny and is unconstitutional under the equal protection component of the Fifth Amendment's Due Process Clause because it distinguishes among aliens on the basis of nationality. See Resp. Br. 25-36. Respondents acknowledge (Resp. Br. 26), however, that the aliens in Hong Kong themselves have no constitutional claim with respect to the visa venue policy. See *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative"). Indeed, the Court has been "emphatic" in "reject[ing] the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (discussing *Johnson* v. *Eisentrager*, 339 U.S. 763, 784 (1950)); see also 494 U.S. at 271, 273.

Nor does the visa venue policy violate any constitutional rights of the U.S. relatives of migrants in Hong Kong. The policy does not depend at all on the nationality, national origin, or any other attribute of an individual or employer who might have filed a visa petition with the INS.[9] It depends solely on the alien's own status under the

[9] Respondents assert (Resp. Br. 27) that a sponsoring U.S. citizen typically has the same national origin as the alien family member. We may assume for present purposes that that is so as an empirical matter, but nothing in the INA *requires* that their national origin be

CPA, and it applies irrespective of whether the alien seeks an immigrant visa based on his or her relation to a U.S. citizen or permanent resident alien, or on some other qualifying ground—*e.g.*, based on an employment preference,[10] or in the "diversity lottery" for immigrant visas. See 8 U.S.C. 1151(a)(2) and (3). Compare *Fiallo* v. *Bell*, 430 U.S. 787 (1977) (rejecting equal protection challenge even where alien's eligibility depended on illegitimate status or gender of U.S. citizen relative). For that reason alone, there is no basis for the respondents in the United States who filed visa petitions to claim any violation of their own equal protection rights.

b. Respondents acknowledge that they would have no constitutional claim if the consular venue policy had been authorized by Congress, in light of Congress's plenary power over the admission of aliens. See Resp. Br. 29-31. Respondents therefore cannot deny that their constitutional argument, even on its own terms, has been substantially undermined by the IIRA. By clarifying that 8 U.S.C. 1152(a)(1)'s prohibition against discrimination on the basis of nationality does not apply to the Secretary's establishment of procedures and locations for the processing of immigrant visas, Congress has now specifically conferred on the Secretary broad (indeed, unreviewable) discretion to make distinctions on the basis of nationality in consular venue matters. Accordingly, putting to one side that the aliens in Hong Kong have no rights under the Fifth Amendment with respect to their admission and that the visa venue policy has no relation to any personal attributes of their U.S. sponsors, respondents' constitutional argument must fail.

c. There is in any event no support for respondents' contention that the level of constitutional scrutiny should be higher where the Secretary of State acts under delegated authority, rather than pursuant to an express mandate or authorization from Congress. The Executive Branch must, of course, faithfully execute the immigration laws enacted by Congress, and—with respect to aliens who have entered the United States—it must afford aliens procedural due process in doing so.[11] But this Court has never suggested that the Constitution itself prohibits the Executive Branch from taking nationality into account in making decisions about aliens residing abroad, much less that such decisions should be subjected to strict scrutiny. Indeed, the Court's decisions point in the other direction, towards establishing that "[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress *or the Executive*" for legitimate immigration or foreign-policy reasons. See *Narenji* v. *Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (emphasis added), cert. denied, 446 U.S. 957 (1980); accord Pet. App. 9a-10a (discussing *Narenji*).

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the same. And there certainly is no basis for suggesting that the visa venue rule applicable to screened-out migrants in Hong Kong was adopted because of the national origin of any of their sponsors in the United States. *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979); compare *Wisconsin* v. *City of New York*, 116 S. Ct. 1091, 1100 n.8 (1996).

[10] An alien may be eligible for an immigration preference based on his or her profession, skills, or other work, without regard to the national origin of the employer sponsoring the admission. See 8 U.S.C. 1153(b), 1154(a)(1)(D). In the companion *Lisa Le* case, at least one of the plaintiffs has sought an employment-based immigration preference as a special religious worker. See *Lisa Le* C.A. App. 399G, ¶¶ 26-27 (lodged with the Clerk at the petition stage).

[11] See *Landon* v. *Plasencia*, 459 U.S. at 32; *Galvan* v. *Press*, 347 U.S. 522, 531 (1954); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49-50 (1950); *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903).

The Court in *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (1950), clearly expressed the view that decisions with regard to the admission of aliens residing abroad implicate inherently executive as well as legislative powers, and that judicial scrutiny of executive actions with regard to excludable aliens is therefore inappropriate except as expressly authorized by Congress. Subsequently, in *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), the Court rejected an argument similar to the one advanced here. There, United States citizens sponsoring an alien scholar for a nonimmigrant visa conceded that, if Congress had enacted a blanket prohibition against the admission of aliens advocating communism, the citizens' First Amendment rights could not override that legislative decision. *Id.* at 767. They contended, however, that because Congress had granted the Attorney General discretion to waive that basis for exclusion, the Attorney General's justification would have to be balanced against the First Amendment rights of the sponsoring citizens. *Id.* at 767-768; cf. Resp. Br. 35-36. The Court held to the contrary, stating that "when the Executive exercises [its discretionary] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." 408 U.S. at 770.[12]

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[12] In *Jean* v. *Nelson*, 472 U.S. 846 (1985), which involved the parole of excludable aliens who were detained in the United States, the Court concluded that the relevant INA provision and regulation did not permit low-level immigration officials to make individual parole release decisions based on race or national origin. 472 U.S. at 855. But the Court did not suggest that immigration-related policy decisions made by the Executive Branch taking nationality into account are subject to strict scrutiny, especially where, as here, the aliens are

Kent v. *Dulles*, 357 U.S. 116 (1958), suggests nothing to the contrary. In that case, the Court held that Congress had not delegated to the Secretary of State the authority to deny a passport to a United States *citizen* on the basis of affiliation with the Communist Party. The Court noted

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outside the United States. The government in fact argued in its brief in *Jean* v. *Nelson* (at 52) that, even in the context of aliens detained in the United States, nationality may be taken into account if there is a rational basis for doing so. See *Jean* v. *Nelson*, 727 F.2d 957, 978 n.30 (11th Cir. 1989) (en banc) (quoting *Narenji*, 617 F.2d at 747), aff'd on other grounds, 472 U.S. 846 (1985); see also *Fiallo* v. *Bell*, 430 U.S. at 793; *Mathews* v. *Diaz*, 426 U.S. 67, 81-82 (1976). The admission of aliens is committed to the political Branches because it is "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations," see, *e.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952), and foreign relations fundamentally require dealing with distinct nations. Just as the conduct of foreign affairs under the Constitution unquestionably permits the United States to treat different foreign countries differently, it permits the United States to treat the nationals of those countries differently. Such distinctions based on *nationality* cannot be equated for constitutional purposes with discrimination on the basis of *national origin* in domestic affairs unrelated to immigration or foreign affairs. Cf. *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973).

Even Justice Marshall's dissent in *Jean* v. *Nelson* acknowledged that "the Executive enjoys wide discretion over immigration decisions." 472 U.S. at 880. Although Justice Marshall would have held that aliens detained at the border had rights under the equal protection component of the Fifth Amendment, he noted that the case did not involve "entry decisions," in which "the Government's interest in protecting our sovereignty is at its strongest and * * * individual claims to constitutional entitlement are the least compelling." 472 U.S. at 875. He also suggested that the Government would have a "strong case" if it showed that its policy was "sufficiently related" to a "legitimate governmental goal," such as "slow[ing] down the flow onto United States shores of undocumented Haitians." *Id.* at 880-881; compare *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 163-164, 187-188 (1993).

that, since a constitutional right to travel abroad was implicated, constitutional concerns would be raised by construing the statute to afford the Secretary that authority. *Id.* at 127-129. The Court did not hold, however, that the level of constitutional scrutiny was more strict simply because the decision had been made by the Executive rather than Congress (see Resp. Br. 32), and indeed it subsequently invalidated an Act of Congress prohibiting the use of United States passports by members of the Communist Party. See *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964).

d. Respondents assert (Resp. Br. 26, 31) that the challenged visa venue policy impermissibly abridges a statutory right of United States citizens to family reunification. The INA, however, simply does not grant to citizens the right to have their relatives admitted to this country.

To be sure, Congress has created a statutory immigration preference for close relatives of citizens, but the argument that citizens thereby have a right in the admission of their alien relatives has been recognized as a "fallacy." See *Fiallo* v. *Bell*, 430 U.S. 787, 795 n.6 (1977). The cognizable interests of the sponsoring U.S. citizens are no different in nature from those accorded to lawful permanent residents and employers in certain circumstances, and they extend only to having the aliens for whom they have filed a visa petition classified for an immigration preference. Once the Attorney General has determined that the alien seeking admission is eligible for such a preference, the interest of the sponsoring relative or employer comes to an end. Consular officials (and, later, INS officials) then apply the statutory rules of admissibility to determine whether the alien may in fact be permitted to enter the United States; the sponsor has no

legally protected interest in that process.[13] Compare 8 C.F.R. Pt. 204 (Attorney General's regulations for processing of visa *petitions*) with 22 C.F.R. 42.61 to 42.74 (State Department's regulations for processing of visa *applications* by aliens); see also 22 C.F.R. 42.41 ("The approval of a petition does not relieve the alien of the burden of establishing to the satisfaction of the consular officer that the alien is eligible in all respects to receive a visa."). Accordingly, it is settled that a sponsoring citizen, like an alien abroad seeking admission, may not seek judicial review of a consular decision if the alien is denied a visa by consular officials. See Gov't Br. 30 & n. 22.[14]

4. We do not dispute that United States citizens may have an earnest and sincere desire to effectuate the

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[13] In this case, for example, even after the INS approved the visa petition filed by respondent Em Van Vo, a United States citizen, to have his daughter Truc Hoa Thi Vo classified as an alien entitled to an immigration preference, consular officials in Hong Kong denied Ms. Vo a visa because they found insufficient information to conclude that she would not be a public charge. Pet. 10 n.7.

[14] Similarly, a United States citizen has no right to intervene in deportation proceedings against an alien relative, because the citizen has no legally protected right in maintaining the alien's presence in the United States. See *Emciso-Cardozo* v. *INS*, 504 F.2d 1252 (2d Cir. 1975); *Agosto* v. *Boyd*, 443 F.2d 917 (9th Cir. 1971) (per curiam); see also *Garcia* v. *Boldin*, 691 F.2d 1172, 1183 (5th Cir. 1982); *Noel* v. *Chapman*, 508 F.2d 1023, 1027 (2d Cir. 1974).

Oyama v. *California*, 332 U.S. 633 (1948), and *Palmore* v. *Sidoti*, 466 U.S. 429 (1984), relied upon by respondents (Resp. Br. 27), are readily distinguishable. They involved infringements of legally protected interests of the United States citizens themselves—in *Oyama*, the citizen son's state-law right to own property, which was denied because of his own racial descent; and in *Palmore*, the mother's interest in the custody of her minor child, which was denied because of the race of the man she married. Neither case involved aliens abroad who were seeking to be admitted to the United States.

immigration of their relatives abroad. Nor do we dispute that Congress has established a significant substantive preference for such immigration. Nonetheless, it remains true (as this Court has recognized for more than a century) that the circumstances under which aliens may be permitted to immigrate to the United States—and indeed may apply for permission to do so—are fundamentally matters of sovereignty within the control of the political Branches of government. They are not subject to judicial review, except under such conditions as Congress expressly authorizes. Because respondents have failed to show that Congress has authorized judicial review of the consular venue policy challenged in this case, that the policy is invalid under any statutory norm, or that the Constitution itself renders the policy invalid, the decision of the court of appeals cannot stand.

* * * * *

For the foregoing reasons, the Court should vacate the judgment of the court of appeals and remand the case for further consideration in light of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. In the alternative, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

OCTOBER 1996

(9)

No. 95-1521

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF STATE,
BUREAU OF CONSULAR AFFAIRS, ET AL.,

Petitioners,

v.

LEGAL ASSISTANCE FOR VIETNAMESE
ASYLUM SEEKERS, INC., ET AL.,

Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR RESPONDENTS

ROBERT B. JOBE
LAW OFFICES OF ROBERT JOBE
360 Pine Street
3rd Floor
San Francisco, CA 94104
(415) 956-5513

WILLIAM R. STEIN
Counsel of Record
DANIEL WOLF
M. KATHLEEN O'CONNOR
ROBERTA KOSS
HUGHES HUBBARD & REED, LLP
1300 I Street, N.W.
Suite 900 West
Washington, DC 20005
(202) 408-3600

Counsel for Respondents

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MISCELLANEOUS

Respondents submit this supplemental brief in response to this Court's order of October 2, 1996.

The Department suggests in its Reply Brief (at 4) that the Court vacate the judgment below and remand this case for further consideration in light of § 633 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRA"). The Court should decline this suggestion and decide the case on the merits. As detailed below, § 633 does not apply retroactively to render moot respondents' statutory claim under 8 U.S.C. § 1152(a)(1) and does not deprive respondents of a remedy for pre-enactment violations of their right to IV processing in Hong Kong -- a right that was fully matured at the time of the enactment of the IIRA. Further, as the Department concedes, § 633 does not render moot respondents' constitutional claim under the Fifth Amendment or their arbitrary and capriciousness claims under the APA.[1]

1. The equities militate against accepting the Department's invitation to vacate and remand. If the Court were to accept this invitation, respondents would be placed in immediate danger of forcible repatriation. In an effort to justify a stay of the mandate in this case and a stay pending appeal in *Lisa Le*, the Department obtained from the HKG an undertaking not to forcibly repatriate plaintiffs here and in *Lisa Le* pending this Court's disposition of this case. In response to this Court's order of October 2, respondents requested that the Department seek from the HKG an extension of the undertaking to cover the proceedings on remand. The Department refused. A remand of the case would cause the HKG's undertakings to lapse and would likely subject respondents to immediate forcible repatriation.

Apart from exposing respondent beneficiaries to the danger of forcible repatriation, vacatur would significantly delay the resolution of a case which, owing in no small measure to the

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1. Whether or not the Court agrees that respondents' § 1152(a)(1) claim is moot, it should proceed to consider these claims. Although the court of appeals did not find it necessary to rule on these claims, where, as here, alternate grounds for relief have been fully briefed and argued before the courts below and the record is sufficient to review them, this Court may consider those grounds. *See Thigpen v. Roberts*, 468 U.S. 27, 30, 32 (1984).

Department's procedural maneuvering (Opp. Cert. at 14-16), has been tied up in the appellate courts for more than two and one half years. This would be unfair to respondents, who filed this action for the purpose of vindicating their right and the right of similarly situated persons to *timely* non-discriminatory processing of their visa applications in Hong Kong in order to end their detention and prolonged separation from their loved ones. *Id.* at 14.

2. Respondents' statutory claims are not moot because § 633 does not retroactively "legalize" a Department policy that violated the INA before it was amended. The Department's discriminatory policy violated § 1152(a)(1) prior to the effective date of the IIRA, September 30, 1996. Section 633 does not render lawful conduct that was unlawful under the old law.

This Court will not construe a new law in a manner that "attaches new legal consequences to events completed before its enactment" absent "an express statutory command" or, at the least, an expression of "clear congressional intent favoring such a result." *Landgraf v. USI Film Prod.*, 114 S. Ct. 1483, 1499, 1505 (1994); *see Greene v. United States*, 376 U.S. 149, 160 (1964).[2]

The presumption against retroactivity is no less applicable in situations where Congress seeks to correct what it believes to be a court's improper statutory construction. As the Court stated in *Rivers v. Roadway Express*, 114 S. Ct. 1510, 1516 (1994), "[e]ven on th[e] assumption" that such factors are present in the case of a given statute, a "clear expression of congressional intent to reach cases that arose before its enactment" is nonetheless required before a statute will be construed to have retroactive effect.

Here, there is no express statutory command making § 633 retroactive. Nor is there any clear expression of legislative intent. To the contrary, the fact that § 633 is silent on the subject of retroactivity, while at least twelve other provisions of the IIRA

2. The fact that § 633 amends a statutory provision that arises in the exclusion context does not alter the presumption against retroactivity. *See Chew Heong v. United States*, 112 U.S. 536 (1884) (applying presumption against retroactivity to statute barring Chinese laborers from reentering the United States who exited without a reentry certificate).

(including the section immediately preceding § 633)[3] are expressly retroactive, is compelling, if not conclusive, evidence that Congress did not intend § 633 to be retroactive.[4]

3. Respondents remain entitled to a remedy for the Department's past illegal conduct. From the time they filed this lawsuit in February 1994, respondents sought two separate remedies: a preventive injunction, i.e., an injunction to compel future compliance with the law, and a reparative injunction, i.e., an injunction to compel the Department to process the IV applications of respondent visa beneficiaries in a manner necessary to remedy, so far as possible, the effects of the Department's past illegal conduct *See* 1 Dan B. Dobbs, *Law of Remedies*, 225, 227 (2d ed. 1993) (distinguishing "reparative" injunctions, which "restore the plaintiff to a preexisting entitlement," and "preventive" injunctions, which enjoin future conduct).[5]

We acknowledge that § 633 may prevent respondents from obtaining the preventive injunction originally sought in their § 1152(a)(1) statutory claim (*but see* pp. 7-8, *infra*), that is, an injunction permanently requiring the Department in the future to process Vietnamese IV applicants in Hong Kong in compliance with § 1152(a)(1) on a non-discriminatory basis.

3. *See* IIRA §§ 212(e), 306(c), 309(c)(5), 321(b), 322(c), 324(c), 342(b), 347(c), 351(c), 412(e)(4), 632(b)(1).

4. The Department's argument that § 633 does apply retroactively is based entirely on two floor speeches of Congressmen who were strongly opposed to § 633. (Reply Br. at 3.) This is hardly the type of clear statement of congressional intent that this Court requires to overcome the strong presumption against retroactive application of a new law. *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988) ("'[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.'").

5. As the district court in this case correctly noted, from the outset respondents sought an "injunction directing defendants 'to take all necessary and proper action to facilitate and expedite processing and to otherwise eliminate the effects of [the Department's] illegal policy.'" Pet. at 25a-26a (quoting plaintiffs' motion for summary judgment); *see also* JA 28.

Respondents, however, remain entitled to reparative relief to remedy the Department's past illegal policy. Section 633 does not on its face eliminate any remedies to which respondents may be entitled for past violations of § 1152(a)(1). For a period of at least eleven months between April 1993 and March 1994, and twenty-two months between December 1994 and September 1996, the Department refused to process Vietnamese IV applicants in Hong Kong, in violation of § 1152(a)(1) as then in effect. During that period, respondents' IV applications were or became "current," i.e., respondents were entitled to immediate processing of their applications and, if found eligible, issuance of a visa -- a process that typically takes a few weeks. As of September 30, 1996, therefore, respondents had a fully matured claim that the Department had discriminated against them in violation of § 1152(a)(1). Had the Department not acted unlawfully, all of the respondents would have been processed before September 30, 1996.

For this reason, respondents' statutory claim is not moot. A case is not rendered moot unless "events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Here, the effects of the Department's illegal policy still persist. Respondents now seek a remedy that looks back to the period of illegal conduct and attempts to put the respondents, as far as possible, into the position they would now be in but for the illegal conduct.

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). In view of the federal court's broad remedial power and the familiar presumption that for every right there is a remedy, reparative relief that orders the Department to restore what it unlawfully withheld unquestionably is available. *See, e.g., Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992); *Bell v. Hood*, 327 U.S. 678, 684 (1946). Indeed, Section 706 of the APA provides courts with broad equitable powers to remedy the impermissible actions of federal agencies, including the power to compel agency action "unlawfully withheld or unreasonably

delayed." 5 U.S.C. § 706. *See also* 5 U.S.C. § 702 (authorizing all forms of relief other than money damages); *Bowen v. Massachusetts*, 487 U.S. 879 (1988). Courts routinely require the government to undertake action not specifically required by law when necessary to remedy the effects of past unlawful conduct.[6]

Nothing in § 633 precludes such relief. Section 633 does not prohibit the Department from processing respondents' IV applications in Hong Kong. It simply says that the Department is no longer required to do so. In light of the presumption in favor of the existence of a remedy, § 633 cannot be construed to bar remedies absent a clear expression of congressional intent to do so. No such clear expression of congressional intent can be found in the language or legislative history of § 633.

Citing *Landgraf*, however, the Department asserts that all injunctive relief is "prospective," and thus, that the enactment of § 633, by rendering the Department's policy lawful at the present time, leaves respondents with no remedy for the Department's unlawful discrimination in the past. Reply Br. at 2.

The Department's position stretches the Court's passing comment in *Landgraf* far beyond its intended meaning. The Court there explained that "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Id.* at 1501. The cases that the Court cited for this proposition (as well as those cited by the Department, Reply Br. at 2-3), however, either addressed statutory enactments that expressly eliminated the requested remedy,

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6. *See, e.g., Louisiana v. United States*, 380 U.S. 145, 154 (1965) (courts have "the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past"); *Greene v. United States*, 376 U.S. 149, 152-53, 160-64 (1964) (petitioner entitled to remedy for lost earnings based on the 1955 regulation in effect at the time of the government's illegal action withholding his security clearance, notwithstanding promulgation while the matter was pending of new regulations placing additional burdens on him); *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 698 (1978); *Konn v. Laird*, 460 F.2d 1318, 1319 (7th Cir. 1972) ("mandamus is available to remedy the consequences" of the government's failure to follow its own regulations) (citing numerous cases); *First Nat'l Bank v. Smith*, 610 F.2d 1258, 1262-63 (5th Cir. 1980).

eliminated the need for any remedy, or involved circumstances where the plaintiffs were not seeking reparative relief.[7] These cases simply do not involve the type of injunctive relief sought by respondents, i.e., relief to eliminate the effects of past unlawful conduct by requiring the Department to process the applications of "current" Vietnamese nationals whose processing was illegally withheld prior to the enactment of § 633.

The operative question in determining whether a remedy is retrospective or prospective is not whether the remedy to be granted will take place in the future -- after all, all remedial decrees, be they judgments for money damages or mandatory injunctions, are to take place in the future -- but whether the purpose of the remedy is to correct for the effects of wrongful conduct in the past or to require future compliance with the law. *See Landgraf*, 114 S. Ct. at 1526 (Scalia, J., concurring) (recognizing that purpose of prospective relief is to affect the future rather than remedy the past). As demonstrated *supra*, that a reparative injunction is available to remedy the effects of past discrimination is well-established.

4. In our merits brief (at 9-10, 25-36), we argued that the State Department violated the equal protection rights of U.S. citizen respondents Em Van Vo, Mandy Yung and Nguyen Van Dien when it discriminated against them on the basis of national

7. *See American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184 (1921) (applying Clayton Act, which had passed during pendency of case and which forbade injunctions to restrain employees from picketing, to remove injunction entered prior to its enactment); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464 (1921) (injunction still available for violation of antitrust law, despite amendment eliminating availability of injunctive relief to remedy other violations); *Hall v. Beals*, 396 U.S. 45 (1969) (eliminating need for remedy as case had become moot under new legislation that reduced the residency requirements for voters from six to two months); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) (after court had ordered removal of bridge found to be nuisance, intervening legislation declared bridge to be lawful road passage; court found because placement of bridge no longer violated the law, it would accomplish nothing to require removal, as bridge could be rebuilt); *Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th Cir. 1996) (intervening legislation explicitly gave defendant right to build a telescope project, thereby superseding the previous restrictions).

origin in the administration of a neutral family reunification program. The Department argues that this claim is no longer valid because Congress in enacting § 633 has expressly delegated to the Secretary affirmative authority to discriminate in visa processing on the basis of race, gender and national origin. The Department is wrong.

As explained in our merits brief (at 29-30), to the extent constitutional authority exists in the immigration context to discriminate against American citizens on the basis of suspect classifications, only Congress (and perhaps the President) may wield such authority. As we further explained (at 31-36), this Court requires clear evidence of congressional intent before it will impute a delegation of authority committing to an administrative agency unfettered discretion to interfere with the enjoyment of a protected liberty interest.[8]

Section 633 is by no means a clear delegation of such authority. By its terms, § 633 authorizes nothing. Rather, the new provision merely states that "*[n]othing in this paragraph* [referring to § 1152(a)(1)] shall be construed to limit the authority of the Secretary of State" in respect of immigrant visa processing. Accordingly, to the extent the Secretary otherwise has the authority to discriminate on the basis of race, gender and national origin, § 1152(a)(1) can no longer be construed as limiting that authority with respect to visa processing. To the extent that the Secretary lacks such authority, however, § 633 does not affirmatively grant him such sweeping and dangerous power. In fact, the Department agrees that the amendment "was intended not to change the law." Reply Br. at 3.

Under the Department's interpretation, § 633 is an affirmative grant of authority to discriminate against any "person" (and not just aliens outside the United States) in visa processing not only

8. *See Greene v. McElroy*, 360 U.S. 474 (1959). In *McElroy*, this Court held that even in the context of national security -- an area involving the most sensitive of interests -- the traditional safeguards of due process may "not be restricted by implication or without the most explicit action by the Nation's lawmakers, *even in areas where it is possible that the Constitution presents no inhibition.*" *Id.* at 507 (emphasis added).

on the basis of nationality and national origin, but also on the basis of race and gender. If this interpretation were correct, § 633 would run afoul of the constitution, even though it relates to immigration. Under the test enunciated in *Fiallo v. Bell*, 430 U.S. 787, 794 (1977), and *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), congressional policy choices concerning the admission of aliens must be supported by at least "a facially legitimate and bona fide reason." A congressional policy choice that would allow the Secretary to discriminate against American citizens in the administration of benefits under a congressional program on the basis of, for example, the race of their family members cannot meet even that level of scrutiny.[9]

5. If the Court is inclined to relinquish this case, it should dismiss the writ of certiorari as improvidently granted, rather than vacating and remanding as the Department suggests, because the reasons given by the Department for why the writ should be granted no longer apply. In its petition (at 25), the Department argued that this Court should grant certiorari because it believed the decision below would deprive the Department of the ability "to respond to uncontrolled migration" and would "cast doubt" on its ability to "require special procedures for visa applications by nationals of certain countries." Whatever merit these arguments once had -- and we believe they had none -- the enactment of § 633 ensures that henceforth § 1152(a)(1) cannot "be construed to limit" the Secretary's authority in these areas. Accordingly, the principal concern that led the Department to seek certiorari has disappeared.

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9. In its supplemental brief, the Department cites *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980), for the proposition that the Executive Branch can draw distinctions among aliens on the basis of nationality, "so long as the classifications are not wholly irrational." *Narenji*, however, is inapposite for two reasons. First, unlike *Narenji*, which involved aliens who were invited to this country on student visas, this case involves the constitutional rights of American citizens. Second, the Attorney General in *Narenji* was acting specifically "at the direction of the President." *Id.* at 617. In contrast, in this case, neither the President not the Congress has delegated to the Secretary, who has no inherent constitutional power of his own over immigration, the authority to discriminate against American citizens.

The other basis on which the Department urged certiorari -- that IV processing would "derail" the CPA -- is even more incredible today than it was when the Department first advanced it. The CPA has expired, leaving the issue of visa processing nothing more than a bilateral issue between the United States and Hong Kong/Great Britain. The record, however, is devoid of any evidence that Hong Kong or Great Britain have any concerns relating to U.S. immigrant visa processing in Hong Kong. To the contrary, both Great Britain and Hong Kong (as well as Australia and New Zealand) process in Hong Kong the IV applications of Vietnamese boat people. Opp. Cert. at 24-25; Supplemental Declaration of Mark L. Zuckerman, executed on Oct. 11, 1996 ("Zuckerman Decl.") at ¶ 7 (lodged with the Clerk). Indeed, Hong Kong has processed over 400 such applications since January 1994. Opp. Cert. at 24. Further, if Hong Kong were concerned about IV processing by the U.S. Consulate, it had and has the power to stop it because the boat people cannot be released from detention to attend consular interviews without the HKG's cooperation.

Nor is there (or was there ever) any danger that IV processing will discourage voluntary repatriation.[10] As a result of § 633, the only persons entitled to IV processing under the decision below are those whose visas became current before September 30, 1996, the effective date of IIRA. There are 35 such individuals out of a total remaining camp population of 11,500. Zuckerman Decl. at ¶ 2. It defies common sense to suggest that the 99.7% of the camp population who are not in this closed group are influenced in their decision to remain in detention by IV processing for the handful of people who are. Opp. Cert. at 25-27.

As the Department is aware, the HKG is determined to clear the camps before the Colony reverts to the control of Communist China on July 1, 1997, and is forcing boat people to return to Vietnam at a rate of 600 to 750 per month. The rate of additional "voluntary" repatriation is now 600 to 700 per month and consists

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10. The Department has never produced anything but self-serving litigation affidavits to support its claim that IV processing reduces voluntary repatriation. The statistical evidence flatly contradicts this claim. Opp. Cert. at 25-26.

largely of those who have been notified that if they do not repatriate by a fixed time, they will be subject to imminent forced repatriation. Zuckerman Decl. at ¶¶ 3-4. It is absurd to suggest that their decision to "voluntarily" repatriate to Vietnam will be influenced one way or another by the decision below. In fact, the United Nations High Commissioner for Refugees recently notified the Department that it does not object to IV processing in Hong Kong of the 35 IV beneficiaries whose visa petitions had become current prior to September 30, 1996 and does not believe that such processing will have any adverse effect on voluntary repatriation. *Id.* at ¶ 6.

Vacatur is inappropriate in this case. As discussed *supra*, § 633 does not retroactively make lawful the Department's policy before September 30, 1996, which the D.C. Circuit held was unlawful under § 1152(a)(1) as it then provided. While the enactment of § 633 may raise a question about the nature of the relief now available to respondents to remedy that past violation of law, the statute says nothing about whether the decision below was incorrect. If, in light of IIRA, the decision below no longer raises issues of important federal law that should be settled by this Court, *see* Sup. Ct. R. 10, the appropriate course is to dismiss the writ and allow the decision below to stand, as it would have had certiorari not been granted. *See Triangle Improv. Council v. Ritchie*, 402 U.S. 497, 498-99 (1971) (Harlan, J., concurring); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75-76 (1955).[11]

CONCLUSION

The Court should consider the case on the merits and affirm. In the alternative, the Court should dismiss the writ of certiorari as improvidently granted.

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11. Dismissal of the writ also would be fairer to respondents than vacatur, because it is likely to result in a quicker disposition by the court below, which would not be burdened by the Department's inevitable effort to relitigate the issues that were decided against it the last time around.

Respectfully submitted,

Robert B. Jobe
LAW OFFICES OF ROBERT JOBE
360 Pine Street
3rd Floor
San Francisco, CA 94104
(415) 956-5513

William R. Stein
Counsel of Record
Daniel Wolf
M. Kathleen O'Connor
Roberta Koss
HUGHES HUBBARD & REED LLP
1300 I Street, N.W.
Washington, DC 20005
(202) 408-3600

Counsel for Respondents

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WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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SUPPLEMENTAL BRIEF FOR THE PETITIONERS

This supplemental brief is submitted in response to the Court's order of October 2, 1996, directing the parties to address the applicability to this case of Section 633 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRA) (enacted as Division C of the Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996)), and whether this case is moot.

1. As we explain in our reply brief filed in this Court on October 7, 1996 (at 2-4), Section 633 of the IIRA eliminates respondents' claim that the consular venue policy challenged in this case discriminates in

the "issuance" of a visa on the basis of nationality, in violation of 8 U.S.C. 1152(a)(1). IIRA Section 633 amended the Immigration and Nationality Act (INA) by adding the following language to Section 1152(a)(1):

> (B) Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed.

See 142 Cong. Rec. H11,827 (daily ed. Sept. 28, 1996). Since respondents seek prospective injunctive relief, there is no doubt that the amendment to 8 U.S.C. 1152(a)(1) governs the disposition of this case. In a case seeking prospective relief, a court is to apply the law in effect at the time of its decision. *Landgraf* v. *USI Film Products*, 511 U.S. 244, 273-274 (1994). Moreover, the legislative history of the new provision demonstrates that it was enacted with the understanding that it would govern this very case. See 142 Cong. Rec. H11,068 (daily ed. Sept. 25, 1996) (Rep. Conyers); *id.* at H11,066 (Rep. Smith); 141 Cong. Rec. S6105 (daily ed. May 3, 1995) (section-by-section analysis of bill proposed by Administration containing provision ultimately enacted as Section 633).

2. Respondents have remaining a claim that the consular venue policy is arbitrary and capricious, in violation of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A), and a claim that the policy violates the equal protection component of the Fifth Amendment's Due Process Clause. The district court rejected those claims, finding them "meritless." Pet. App. 27a n.3. The court of appeals had no occasion to address those contentions, however, since its decision was based solely on Section 1152(a)(1). Nor are

respondents' APA and constitutional claims within the questions presented by the government's petition for a writ of certiorari. They are, rather, presented by respondents as alternative grounds for affirmance of the judgment below.

Enactment of the IIRA has not mooted respondents' APA and constitutional claims, since the alien respondents in Hong Kong remain subject to the consular venue policy, or could be subject to it if they sought to file an immigrant visa application in the future. Enactment of the IIRA therefore has not mooted this case. The IIRA has, however, substantially undermined the APA and constitutional claims, as we have explained in our reply brief (at 4-5, 10-11, 14-15).

As regards the APA claim, the legislative history of the IIRA confirms that, as we have argued (Gov't Br. 18-39; Gov't Reply Br. 4-11), consular venue matters are committed to the unreviewable authority of the Secretary of State. The Conference Report on the IIRA states:

> Section 633—House section 803(a) recedes to Senate amendment 172. This section amends INA section 202(a)(1) to clarify that the Secretary of State *has non-reviewable authority* to establish procedures for the processing of immigrant visa applications and the locations were visas will be processed.

142 Cong. Rec. H10,906 (daily ed. Sept. 24, 1996) (emphasis added); accord H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 270 (1996).

As regards the constitutional claim, respondents have conceded that the aliens in Hong Kong have no constitutional claim at all. Resp. Br. 26. They have

also acknowledged that the aliens' U.S. citizen sponsors would have no constitutional claim if the consular venue policy had been authorized by Congress, in light of Congress's plenary power over aliens. See *id.* at 26, 29-31. Respondents therefore cannot deny that their constitutional argument, even on its own terms, has been eroded by the IIRA. Congress has now confirmed that the Secretary has broad (and unreviewable) authority to make distinctions on the basis of nationality in consular venue matters. See Gov't Reply Br. 14-15.

Moreover, the court of appeals recognized in this case that, under its prior precedent in *Narenji* v. *Civiletti*, 617 F.2d 745, 747-748 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980), the Executive may draw distinctions on the basis of nationality, even among aliens in the United States, so long as the classifications are not wholly irrational. Pet. App. 9a-10a. The court below distinguished *Narenji* on the ground that here, in the court's view, there was a statutory provision, Section 1152(a)(1), "flatly forbidding" classification on the basis of nationality in consular venue matters. Pet. App. 10a-11a. Such reliance on Section 1152(a)(1) is now foreclosed by the IIRA.

Accordingly, even if we assume arguendo that the consular venue policy respondents challenge is properly regarded as classifying on the basis of nationality (but see Gov't Br. 45-48)—and even if we assume further, arguendo, that the standard of constitutional review would be the one applicable to aliens in the United States—then, under the court of appeals' own reasoning, the policy must be sustained if it is not wholly irrational. Plainly the policy is not irrational. The more fundamental flaw in respondents' constitutional claim, however, is that the aliens in this case

are *outside* the United States, and therefore have no claims under the Fifth Amendment with respect to their applications for permission to travel to the United States to seek admission to this country. See Gov't Reply Br. 13.

In sum, the question on the merits on which this Court granted review (the applicability of Section 1152(a)(1) to consular venue matters) has been definitively resolved by legislation. The remaining legal claims in the case, advanced by respondents as alternative arguments in support of the judgment below, are without merit and were properly rejected by the district court. Those remaining claims have been still further undermined by legislation enacted after the court of appeals rendered its decision and after the parties filed their principal briefs in this Court. "While it is true that a respondent may defend a judgment on alternative grounds, [the Court] generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co.*, v. *Epstein*, 116 S. Ct. 873, 880 n.5 (1996). That is especially appropriate here, in light of the intervening enactment of the IIRA. Accordingly, we suggest that the Court vacate the judgment of the court of appeals and remand the case to that court for further consideration in light of the intervening legislation. See *INS* v. *Elramly*, No. 95-939 (Sept. 16, 1996); *Bureau of Economic Analysis* v. *Long*, 454 U.S. 934 (1981).

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For the foregoing reasons, and for the reasons set forth in our reply brief, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. In the alternative, the judgment of the court of appeals should be reversed, for the reasons set forth in our opening and reply briefs.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

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